

Missouri Attorney General's Opinions - 1970

Opinion	Date	Topic	Summary
3-70	Nov 20	CRIMINAL LAW. ARREST. POLICE.	A regularly employed police officer of a third class city retains the same powers to arrest while off-duty which he possesses while on duty; the liability of a police officer of a third-class city for false arrest and other related torts depends upon the lawfulness of the arrest; the lawfulness of an arrest made by a police officer from a third class city does not depend upon whether the policeman was on or off duty; and a private citizen may only arrest for those misdemeanors which involve breaches of the peace, petit larceny committed in his presence, or pursuant to those powers granted him by virtue of Section 537.125, RSMo 1969, and Section 560.415, RSMo 1969.
4-70	June 8	COUNTY COLLECTORS. TOWNSHIP COLLECTORS. SOCIAL SECURITY. LIBRARIES. COUNTY LIBRARIES.	1. County and/or township collectors may charge commissions authorized to them against funds collected for library purposes. 2. The County Library Board is not required to make payments from library funds of the "employer's share" of social security tax payments for the benefit of the county or township collectors who have collected library taxes for the reason that such payments do not constitute taxable wages paid by an employer to an employee within the meaning of the Social Security Act.
5-70	Jan 12		Opinion letter to the Honorable William H. Wessel
6-70	May 13	CIVIL DEFENSE.	When the citizens of a county are threatened by a disaster, the County Court has the authority to activate the county's civil defense personnel without requesting authority from the governor; said person so activated have all rights, duties, and responsibilities granted them under Chapter 44 RSMo Supp. 1967 and by the rules and regulations thereunder.
8-70	Jan 13		Opinion letter to the Honorable R. M. Becker
11-70	Jan 12	PUBLIC RECORDS. STATE RECORDS.	The authority of the Director of the State Records Commission under the State Records Law in microfilming records is limited to microfilming records which are to be stored or preserved, and it does not apply to microfilming records used currently by state agencies.
12-70	Mar 6	CITIES, TOWNS AND VILLAGES. RUBBISH.	The City of Brentwood has the authority under Sections 71.680 and 71.690, RSMo, to charge and collect an annual fee for the collection of rubbish, and as a matter of convenience to bill for the fee on the annual real estate bill, so long as it is not considered and treated as

			a real estate tax.
13-70	Jan 19	COUNTY COURTS.	The Boone County Court has no authority to convey by gift to the Boone County Agricultural and Mechanical Society real property belonging to the county.
14-70	Jan 21		Opinion letter to the Honorable Joseph Jaeger, Jr.
15-70			Withdrawn
16-70			Withdrawn
19-70	July 6	DIVISION OF HEALTH. AGRICULTURE.	The provisions of the Missouri Dairy Law, Section 196.520 to Section 196.690, RSMo, do not prevent the Missouri Division of Health from exercising authority under the provisions of the Missouri Food, Drug and Cosmetics Act, Sections 196.010 to 196.120, RSMo.
20-70			Withdrawn
20A-70	Apr 24	STATE RECORDS ACT. PUBLIC RECORDS.	State Records Act does not apply to: (1) Kansas City Police Board, (2) Kansas City Election Board, (3) Kansas City Area Transportation Authority, (4) Kansas - Missouri Air Conservation Commission, (5) "Bi- State Metropolitan Development District". State Records Act applies to: (1) Air Conservation Commission, (2) Crippled Children's Service, (3) Bridge Commissions.
21-70	Jan 12		Opinion letter to the Honorable Charles S. Broomfield
23-70	Jan 21	COOPERATIVE AGREEMENTS. COUNTY COURTS. COUNTY CLERKS.	(1) Clay County can contract with the municipalities of Clay County to extend the taxes for said municipalities. (2) The County Clerk of Clay County has the discretionary authority to decide whether he will enter into a cooperative agreement with a municipality of Clay County to provide a common service pursuant to cooperative agreement statute; and assuming that the clerk of Clay County decides to enter such a contract, the contract must be taken before the county court of Clay County for approval. (3) Any consideration paid pursuant to a cooperative agreement contract for the extension of taxes between the county clerk of Clay County and the municipalities of Clay County must be paid into the county treasury.
25-70	Jan 22		Opinion letter to Dexter D. Davis
26-70			Withdrawn
27-70	Feb 5		Opinion letter to the Honorable Haskell Holman
28A-70	Mar 19	TAXATION (CITIES, TOWNS & VILLAGES). EARNINGS TAX.	The cities of Kansas City and Independence cannot, whether by statute or by city charter, enter into an agreement whereby each would rebate to the other earnings taxes collected from residents

			of the other city.
29-70			Withdrawn
30-70	Sept 14		Opinion letter to the Honorable Robert H. Branom
31-70	Mar 10		Opinion letter to the Honorable Haskell Holman
32-70	Oct 20	PREVAILING WAGE LAW. PUBLIC WORKS.	<p>The term “public works” as used in Section 290.210(7), RSMo 1969, of the prevailing wages law means structural works having a permanent character and usefulness, such as roads, buildings, bridges, and dams. The term “maintenance work,” Section 290.210(4), RSMo 1969, means the repair or restoration of that portion of an existing facility which has fallen into a state of deterioration or decay to its original condition. “Maintenance work” does not include “major” repairs or “replacement;” the latter constitute “construction.” “Replacement” entails the complete substitution of an existing facility with a new or different facility. Installing a central air conditioning unit in a public building constitutes “construction” within the meaning of Section 290.210(1), RSMo 1969, if the building was formerly without such a unit. Substituting a new central air conditioning unit or furnace in a public building in place of a deteriorated or worn out unit or furnace also constitutes “construction.” However, replacing a worn out part of a central air conditioning unit or furnace in order to restore the unit or furnace to operational condition constitutes “maintenance work” within the meaning of Section 290.210(4), RSMo 1969. Installing new or different partitions in a public building, either at the location of former partitions or at a different location, and rearranging present partitions constitutes “construction,” Section 290.210(1), RSMo 1969. However, restoring an existing partition to sound condition by repairing the deteriorated portion constitutes “maintenance work,” Section 290.210(4), RSMo 1969. Tarring a roof of a public building constitutes “maintenance work,” Section 290.210(4), RSMo 1969, if the roof is in a state of disrepair or deterioration, otherwise it would be “construction,” Section 290.210(1), RSMo 1969. Putting an entirely new roof on a public building constitutes “construction,” Section 290.210(1), RSMo 1969. Installing new garage doors on a public building constitutes “construction,” Section 290.210(1), RSMo 1969. Seal coating small cracks in the surface of an asphalt highway constitutes “maintenance work,” Section 290.210(4), RSMo 1969.</p>
33-70	Feb 11	COURTS. CLERKS OF COURTS. FEES.	An opinion with respect to House Bill No. 35 of the 75th General Assembly (Sections 483.530 and 483.540, V.A.M.S.) relative to numerous questions concerning the fees of clerks of certain courts

		COSTS.	of criminal correction, circuit and common pleas courts.
34-70			Withdrawn
36-70	Jan 12		Opinion letter to the Honorable John J. Johnson
37-70	Apr 30	GENERAL ASSEMBLY. LEGISLATIVE EMPLOYEES.	Section 21.150, RSMo Supp. 1967, which allows the members of the minority party of the House of Representatives to employ one stenographer or secretary for each five members of the minority party is not unconstitutional when tested by the "one man-one vote" principle as articulated by the Supreme Court of the United States.
38-70	July 31		Opinion letter to the Honorable Joe D. Holt
39-70	Mar 23		Opinion letter to George A. Ulett, M. D.
40-70			Withdrawn
41-70	Jan 13		Opinion letter to Mr. Joseph Jaeger
42-70	Jan 14	TAXATION (CIGARETTE TAX). CIGARETTE TAX. CONSTITUTIONAL LAW.	House Committee Substitute for Senate Substitute for Senate Bills Nos. 1, 185 and 215 of the 75th General Assembly is not unconstitutional in violation of Article III, Section 23, Missouri Constitution.
43-70	Mar 30	ELECTIONS. INITIATIVE & REFERENDUM. PETITION.	(1) A person who wilfully and falsely executes a verification affidavit on a referendum petition may be punished therefore by a fine not exceeding \$500 or by imprisonment in the penitentiary not exceeding two years, or by both such fine and imprisonment. (2) The Secretary of State is not under a statutory duty to forward such information as he might possess regarding the wilful and false execution of a verification affidavit on a referendum petition to appropriate prosecuting officials.
44-70	Feb 18	CONFLICT OF INTEREST. CITIES, TOWNS AND VILLAGES. CITY CONTRACTS. FIRE DEPARTMENTS.	A fourth class city fire chief who sells equipment and services to such city through a company owned in whole or in part by him violates Section 106.300, RSMo 1959, which prohibits city officers from being directly or indirectly interested in city contracts.
45-70	Feb 3		Opinion letter to Mr. J. Warren Head
46-70	Sept 30	CONSERVATION COMMISSION. ARRESTS. TRESPASS.	1. In order for information obtained from an alleged violator of conservation rules during "custodial interrogation" to be used against that person to support a conviction, the accused must first be informed of his Fifth Amendment rights in accordance with the guidelines set forth by the United States Supreme Court in the Miranda case. 2. A conservation agent acting in the performance of his duties will not be guilty of trespass by reason of his entering the

			lands of private persons; an agent is "within the performance of his duties" in entering the lands of private persons only if he has reason to suspect violation of fish and game laws. 3. A person accused of a game violation is not necessarily entitled to a written summons or complaint at that immediate time. 4. A person is not required to produce identification other than the production of a fishing or hunting license to an agent of the Conservation Commission.
50-70			Withdrawn
51-70	Aug 18	TAXATION (INHERITANCE).	In the situation where a life estate is given to A with a vested remainder in B if B survives A but if not a contingent remainder in C, and if the tax rate is the same for B and C, then inheritance tax under Chapter 145, RSMo, should be taxed as a life estate against A and the remainder against B.
52-70	Mar 19	INSURANCE. MUTUAL INSURANCE COMPANIES.	County mutual insurance companies that have elected to accept the provisions of Sections 380.580 to 380.840, RSMo 1959 are subject to the provisions of Sections 379.810 to 379.880 V.A.M.S. and that town mutual insurance companies under 380.280 to 380.470, RSMo 1959, and farmers mutual insurance companies organized or operating under Sections 380.580 to 380.840, RSMo 1959, are not subject to and cannot become subject to Sections 379.810 to 379.880, V.A.M.S.
55-70	Mar 24	SCHOOLS. SCHOOL FUNDS.	A six-director school district in Missouri is not authorized to pledge net revenues received as tuition from persons attending a vocational school operated by the school district as security for the payment of the principal and interest on revenue bonds issued by the district pursuant to Section 164.231, RSMo Supp. 1967, as amended, to finance the cost of constructing a dormitory to be used to house persons attending such vocational school.
56-70	Feb 4	STATE COLLEGES. SCHOOLS.	There is nothing in the Missouri Constitution or statutes or the United States Constitution prohibiting the placing of student teachers in parochial or private schools as part of the student teaching programs at Northeast Missouri State College.
57-70			Withdrawn
58-70	Mar 17		Opinion letter to the Honorable Thomas R. Gilmore
59-70	Mar 17	TEACHERS. JUNIOR COLLEGES. SCHOOLS.	Junior colleges organized pursuant to the provisions of Section 178.770 to 178.890, RSMo 1967 Supp., are not subject to the provisions of the Teacher Tenure Act, Sections 168.102 to 168.130 V.A.M.S.

62-70			Withdrawn
63-70	Sept 30	ESCHEAT. INSURANCE.	There are no laws of Missouri requiring escheat of funds held by insurance companies currently doing business.
64-70	Mar 2	REVENUE BONDS. CITIES, TOWNS & VILLAGES. SEWERS.	The municipality of Oak View has the authority to conduct a bond election for the issuance of revenue bonds to extend and improve a sewerage system. The municipality may impose user charges on those persons connected with the system, and need not tax vacant land within the city for the support of the sewerage system.
65-70	June 11	COUNTY ASSESSORS. COUNTY CLERKS. SOCIAL SECURITY. TOWNSHIP COLLECTORS.	For purposes of the Social Security Act: 1. County clerks and county assessors are employees of the counties and township collectors are employees of the townships wherein they were elected to office. They are not "joint employees" of several political entities. 2. A township collector is an official of the township. 3. Fees derived by a township collector from collecting school taxes do not constitute "wages"; therefore, a township is not responsible for reporting and paying the employer's share of the Social Security Tax thereon.
66-70			Withdrawn
67-70	Apr 3	TAXATION:(EXEMPTIONS)	In a situation where a private individual conveys a parcel of real estate to the University of Missouri by deed of gift, reserving a life estate in himself which is thereafter leased to the University, the life estate is exempt from taxation only if put to the exclusive use of the University for school purposes and only if the lease does not provide for other than nominal rent payments to the lessor; if not found to be exempt, only the life estate in the hands of the grantor is subject to taxation and tax sale.
68-70	Jan 9	MOTOR VEHICLE. CRIMINAL LAW.	A motor vehicle operator who fails to stop on signal of a member of the State Highway Patrol, or otherwise willfully fails or refuses to obey any reasonable signal or direction given in the direction of traffic has committed a moving violation and should have two points assessed against his driving record by the Director of Revenue.
69-70			Withdrawn
70-70	Jan 19		Opinion letter to the Honorable William S. Brandom
72-70	Mar 3	SCHOOLS. STATE AID.	1. Pursuant to subparagraph 9 of Section 163.031, V.A.M.S., a school district must spend for teachers' salaries in the year in which the money is received at least eighty percent of all state school funds received pursuant to Section 163.031 unless exempted from such requirement by the State Board of Education. 2. Pursuant to

			<p>Section 163.061, RSMo Supp. 1967, a school district must place at least eighty percent of all state school moneys received under Sections 1, 2 and 3 of Section 163.031 in the teachers' fund and the balance, if any, in the incidental fund. 3. The only restriction placed by subparagraph 9 of Section 163.031 on a school board's discretion in setting a levy under Section 164.011 is that the district must spend on teachers' salaries in the current year as much of the revenue produced by local tax levies as was spent for that purpose in the previous year. 4. The State Board of Education is responsible for the enforcement of subparagraph 9 of Section 163.031.</p>
73-70	Jan 9	TAXATION. COUNTY COLLECTOR.	<p>1. A county collector is required to issue a receipt for taxes paid under protest as provided for in Section 139.031, Senate Bill 39, 75th General Assembly, which receipt shall state that the tax is paid under protest; 2. When a tax is paid under protest as provided in Section 139.031, on or before the due date thereof, no penalties can be assessed or collected even though the time for filing suit for recovery of the protested tax does not expire until after the end of the calendar year in which the tax was paid.</p>
75-70	Jan 12		Opinion letter to the Honorable Phillip H. Snowden
76-70	Mar 2	BONDS. SCHOOLS. CITIES, TOWNS & VILLAGES. INTEREST.	<p>1. House Bill No. 2 invalidates contracts entered into prior to the effective date of said bill which call for the private sale of bonds by a school district in which the interest rate will exceed six percent where such bonds had not been issued as of the effective date of said bill. 2. A contract entered into prior to the effective date of House Bill No. 2 between a city and a private party calling for the sale of bonds with an interest rate of six percent or less, subject to an escalation in the event of a rise in the Dow-Jones Bond Index or a similar national bond yield index, is invalid when the effect of the escalation clause would result in the issuance of bonds at private sale with an interest rate in excess of six percent subsequent to the effective date of House Bill No. 2. 3. "Reasonable notice," as the term is used in House Bill No. 2, constitutes that notice which is reasonably calculated to inform the general public that bonds with interest rates in excess of six percent are to be offered at public sale.</p>
77-70	May 27		Opinion letter to the Honorable Eugene F. Mazzuca
78-70	Apr 6	LIQUOR. INTOXICATING LIQUOR.	<p>1. Senate Bill No. 37, 75th General Assembly, does not apply to sales of 3.2% non-intoxicating beer. 2. Senate Bill No. 37 does not permit persons under the age of twenty-one years working in drug stores or grocery stores of the type mentioned therein to stock shelves, arrange displays, provide carry out service, or perform</p>

			other tasks necessary to the exposure of intoxicating liquor for sale as such activities involve the sale or assisting in the sale or dispensing of intoxicating liquor but authorizes persons eighteen or over to accept payment for intoxicating liquor.
79-70	Sept 30	PRISONERS. SHERIFFS. CRIMINAL PROCEDURE. CONVICTS.	The sheriff of the county in which an untried indictment or information is pending against a prisoner has the duty to transport the prisoner and is to be compensated pursuant to the provisions of Section 57.290, RSMo 1969. Because of the enactment of Section 222.120, RSMo 1969, Attorney General Opinion No. 15, issued to the Honorable James D. Carter, March 23, 1956, is hereby withdrawn.
80-70	Aug 7	CRIMINAL PROCEDURE. BONDS. BAIL.	Section 56.310, RSMo 1969, which provides that a prosecuting attorney is entitled to receive ten percent of all sums collected if not more than five hundred dollars and five percent of all sums over five hundred dollars, to be paid out of the amount collected, on recognizances given to the state in criminal cases and which are or may become forfeited, applies to bail bonds as well as recognizances.
82-70	Sept 2	SCHOOLS. CONSTITUTIONAL LAW.	A school district is authorized to allow the use of school premises by church or religious organizations for religious purposes during times when the use for school purposes is not required provided that a fair and adequate consideration is received for such use.
83-70	Jan 15	POLITICAL COMMITTEES. PARTY COMMITTEES.	The county chairman and vice-chairman of counties containing territory in more than one congressional district are not by virtue of holding such offices members of a congressional committee. It is the further opinion of this office that the township and ward committeemen and committeewomen of townships and wards which contain territory in more than one congressional district are, by virtue of such offices, members of the congressional district committee of each district which contains any part of such a ward or township.
84-70	Mar 6		Opinion letter to the Honorable Donald L. Manford
85-70	Feb 16	CONSTITUTIONAL LAW. GENERAL ASSEMBLY.	(1) Senate Substitute for House Joint Resolution No. 4 was passed in the form such resolution was signed by the presiding officer of each House and filed with the Secretary of State; (2) the General Assembly may reconsider and redraft a resolution already passed by the General Assembly and referred to the people before the election is held.
86-70			Withdrawn
87-70			Withdrawn

88-70	Jan 19	CIRCUIT CLERKS. COMPENSATION AND FEES. RECORDER OF DEEDS. COURTS.	With respect to House Bill No. 119 of the 75th General Assembly. (Section 50.334, V.A.M.S.), circuit clerks coming within the total compensation provisions of said bill are no longer authorized to retain the ten cents out of each bar enrollment fee allowed under Supreme Court Rule 6.04, and that circuit clerks-recorders and recorders covered by such section are not entitled to charge the fees provided for transcribing books or records belonging to the office of the recorder of deeds under Section 59.600, RSMo 1959.
89-70	July 16	SCHOOLS. JUNIOR COLLEGES. ASSESSMENTS.	If a junior college district includes parts of more than one county and the State Tax Commission increases by more than ten percent the assessed valuation of only one county in the district, the district must revise its tax rate pursuant to the requirements of Section 137.073, RSMo 1959. Such a junior college district should revise its rate of levy to the extent necessary to produce from all taxable property in the district substantially the same amount of taxes as had been previously estimated to be produced by the original tax rate.
90-70	Jan 12	TAXATION.	An endorsement written on the back of a check presented in payment of tangible property taxes expressly stating that payment is being made under protest and citing an appropriate statute which clearly sets forth the grounds for protest, is a sufficient payment under protest to require impounding of the taxes so protested under Senate Bill No. 39, 75th General Assembly.
92-70	Feb 11	CITIES, TOWNS, AND VILLAGES. OFFICERS.	There is no constitutional or statutory provision disqualifying a person from running for the position of Alderman of the City of St. Louis because he is employed as an assistant principal in the School District of the City of St. Louis.
93-70	Feb 20	PROSECUTING ATTORNEY.	Prosecuting attorney of second class county has authority and duty to appear on behalf of county officers, employees and board members who are sued in an action testing county's authority.
94-70			Withdrawn
95-70	Jan 9	MOTOR VEHICLES. LICENSES. MOTOR VEHICLE LICENSES.	The Director of Revenue, as a result of the enactment of Senate Bill No. 242 by the 75th General Assembly amending Section 301.137, RSMo, cannot issue a special series of license plates for persons who have amateur radio operators' licenses.
96-70	Feb 2	CONSTITUTIONAL LAW. STATUTES. GENERAL ASSEMBLY.	1. A legislator, removed from his position as a result of an ouster suit wherein he is declared to have lacked the qualifications required for election, is a de facto officer when he holds office by some color of right or title. 2. It is well established in Missouri jurisprudence that the acts of a de facto officer are valid and

			effectual when they concern the rights of the public, until the officer's title is judged insufficient. Therefore, those measures that were approved by a bare constitutional majority with the ousted legislator a member of the majority, in the last session of the General Assembly, are valid.
97-70	Feb 10	TAXATION.	It is mandatory for a taxpayer to file suit to compel refund of taxes paid under protest in accordance with the provisions of Sections 1, 2 and 3 of Senate Bill No. 39, 75th General Assembly, (Section 139.031, V.A.M.S.) and the county court is not empowered to take administrative action authorizing the collector to refund such taxes. Section 4 of Senate Bill No. 39 authorizes refund by the collector of any real or tangible personal property tax mistakenly or erroneously paid.
99-70	Jan 16		Opinion letter to the Honorable Joseph P. Teasdale
100-70	Mar 30	INSURANCE.	A life insurance company is in violation of Section 375.936, House Bill No. 84, Seventy-fifth General Assembly, if it issues a policy which excludes benefits payable to chiropractors.
101-70	Apr 2		Opinion letter to the Honorable John E. Parrish
102-70	Jan 30	SCHOOLS.	Subject to restrictions set forth in Section 177.101, RSMo Supp. 1967, the Doniphan R-I School District may enter into an agreement with the State Inter-Agency Council for Outdoor Recreation for a grant-in-aid from the Federal Land and Water Conservation Fund to assist the school district in the purchase of a school-community park.
103-70	Jan 22		Opinion letter to Dexter D. Davis
104-70			Withdrawn
106-70	Feb 24		Opinion letter to the Honorable Ralph W. Gilchrist
107-70	Jan 9	USURY.	Loans governed by Missouri usury statutes may not exceed eight per cent interest, even though FHA and VA permit maximum rate of eight and one-half per cent.
108-70	Jan 9	SHERIFFS. COMPENSATION. FEES, COMPENSATION AND SALARIES.	The provisions of Senate Bill No. 165 of the 75th General Assembly (Sections 57.407 and 57.409, V.A.M.S.) providing that sheriffs of the third and fourth class counties must pay all fees collected by him in civil matters and which were previously retainable by him into the county treasury apply to commissions earned and received by said sheriffs pursuant to the provisions of Section 57.280 and Section 528.610, RSMo 1959, relating respectively to receiving and paying moneys on executions and to sale of real estate for partition purposes, and such commissions must be paid into the county

			treasury by such officers.
109-70	Jan 9	SHERIFFS. DEPUTY SHERIFFS.	Under the provisions of Section 1 of House Bill No. 264 of the 75th General Assembly (Section 57.295, V.A.M.S.) relating to uniform allowances of \$25 per month for sheriffs and full-time deputy sheriffs who wear an official uniform in the performance of their duties, the county court has the discretion to determine whether or not such allowances shall be made to such officers and may make such allowances for such periods as the county court deems proper. However, the county court does not have the authority to vary the amount of the monthly allowances from that fixed by the act, nor to provide the allowance for one such officer to the exclusion of the other such officers.
110-70	Jan 12	STATE TREASURER. DIRECTOR OF REVENUE. SALES TAX. TAXATION (SALES TAX).	The legislature may not impose the duties set forth in the City Sales Tax Act upon the State Treasurer, but that the portion of the act imposing these duties can be severed from the balance of the act.
112-70	Mar 9	COUNTY ASSESSOR.	A person holding the office of county assessor when payments are due under Section 53.143 Mo. Supp. 1967 is entitled to such payments.
113-70	June 15	COUNTY COLLECTOR. TAXATION.	1. A county collector of a third class county in his discretion may deposit tax money paid under protest and impounded pursuant to Senate Bill No. 39, 75th General Assembly, in interest-bearing time deposit accounts. 2. The interest earned on deposits of taxes paid under protest shall be paid to the person who is found to be entitled to the impounded money.
114-70	Jan 29	PUBLIC RECORDS.	Records required by law to be kept by public officials in this state, unless otherwise provided by law, are subject to inspection by any citizen of Missouri under reasonable rules and conditions imposed by the legal custodian of such records and whether the conditions or regulations imposed are reasonable depends upon the conditions and rules imposed in each individual case.
115-70			Withdrawn
116-70	Feb 16	DRAINAGE DISTRICTS.	Drainage districts organized by the county court may construct new ditches.
118-70	Feb 25		Opinion letter to the Honorable Lawrence J. Lee
119-70	Mar 18	CITIES, TOWNS AND VILLAGES. TAXATION (CITIES).	A simple majority vote constitutes authorization for a 20 cents tax levy for park purposes in a fourth class city, under 30,000 population, under the provisions of Section 90.500, RSMo Supp. 1967, assuming, of course, that the 20 cents tax levy when

			combined with the general municipal tax levy does not exceed the constitutional limit of \$1 required by Article X, Section 11(b), Constitution of Missouri.
120-70	Feb 17		Opinion letter to L. M. Garner, M.D.
121-70	May 26	SCHOOLS. COUNTIES.	(1) When real estate belonging to the county and township school funds is liquidated pursuant to Article IX, Section 7 of the Constitution the oil, gas and mineral rights in such real estate must also be liquidated and may not be reserved to the county. (2) The proceeds derived from the sale of such real estate together with those derived from the sale of the oil, gas and mineral rights shall be credited to the county school fund.
123-70	Mar 23		Opinion letter to Mr. Oscar J. Chapman
124-70	Mar 4		Opinion letter to the Honorable Joe D. Holt
125-70	Mar 10		Opinion letter to the Honorable F. L. Brenton
126-70	July 21	SCHOOLS. STATE AID.	Where the assessment of property in a school district is reduced by the State Tax Commission to a point where the district's levy is not sufficient to qualify it for the additional state aid for tax effort provided in Section 163.031(1), V.A.M.S. Senate Bill Nos. 1, 185 and 215, Seventy-fifth General Assembly, and the district does not increase its tax rate before the year ends, the district can do nothing thereafter to qualify for the additional state aid for tax effort provided in Section 163.031(1).
129-70	May 7		Opinion letter to the Honorable George J. Pruneau
132-70	Feb 3		Opinion letter to the Honorable George W. Parker
133-70	Mar 6	PROFESSIONAL CORPORATION. CORPORATION. PODIATRISTS.	The General Business and Corporation Law of Missouri, which permits corporations to be organized for any lawful purpose, does not authorize the organization of a corporation to engage in the practice of chiropody-podiatry where a statute regulating such practice contemplates only the licensing of individuals.
134-70	Jan 22		Opinion letter to the Honorable L. Edward Stone, Jr.
135-70	Apr 2		Opinion letter to the Honorable Noel Cox
136-70	Feb 3	SHERIFFS. COMPENSATION AND FEES.	With respect to Paragraph 3 of Section 57.407 and Paragraph 3 of Section 57.409, V.A.M.S. (Senate Bill No. 165, 75th General Assembly), which require that the sheriffs of third and fourth class counties pay fees collected by them in civil matters into the county treasury, except the charges for each mile traveled, that such sheriffs are not to collect charges for services where such charges are payable out of the county treasury.

138-70	Mar 18	TAXATION (SALES AND USE). MOTOR VEHICLES.	The trade-in allowance in Section 144.025, RSMo Supp. 1967, does not apply to any article, including an automobile, on which a sales or use tax has not been paid to Missouri. Therefore, sales tax is due on the full purchase price of a new automobile purchased in Missouri when an automobile registered, purchased and driven for 90 days in good faith in another state is used as a trade-in.
140-70	Jan 28		Opinion letter to the Honorable James C. Kirkpatrick
141-70	May 7	JUVENILE OFFICERS. PROSECUTING ATTORNEYS. SHERIFFS.	Prosecuting attorneys and sheriffs or other law enforcement officers occupy positions that are incompatible with and in conflict with the position of the juvenile officer under the Juvenile Act, and therefore, such officers may not serve as juvenile officers or deputy juvenile officers.
142-70	Mar 18		Opinion letter to the Honorable James L. Paul
143-70	Apr 1	MOTOR VEHICLES. LICENSES.	When the Director of Revenue receives notice of forfeiture of collateral under Section 302.302, RSMo Supp. 1967, he must assess the appropriate points. If notice is received that the forfeiture has been set aside or vacated, the assessment of points based on that forfeiture of collateral is a nullity and all records should be adjusted accordingly. If after setting aside the forfeiture of collateral there is a conviction of the offense, the Director must, upon receipt of notice of such conviction, assess points and take whatever additional action that is called for by the assessment of such points.
144-70	Mar 6		Opinion letter to the Honorable Leon M. Jordan
145-70	Mar 20	CIRCUIT CLERKS.	The Clerk of the Circuit Court of the City of St. Louis does not have discretionary authority to invest funds deposited in the registry of the court in United States Treasury Notes under Section 483.310, RSMo 1959.
146-70	Jan 22	ELECTIONS. REFERENDUM. GENERAL ASSEMBLY.	The General Assembly may, in its discretion, set a special election date for a vote on a measure which has been referred to a vote of the people by a proper referendum petition.
147-70	Feb 3		Opinion letter to the Honorable James Russell
148-70	Oct 5	POLITICAL SUBDIVISIONS. SAVINGS AND LOAN. COUNTIES. CITIES, TOWNS AND VILLAGES.	Section 369.325, RSMo 1969, does not violate Article VI, Section 23 of the Missouri Constitution of 1945, and that any municipality or political subdivision of the State of Missouri may legally invest its funds in a savings and loan association pursuant to those conditions set out in paragraph 1 of Section 369.325, RSMo 1969.
149-70	Apr 9	SCHOOLS. CONTRACTS.	1. The superintendent's contract was automatically renewed for the 1969-1970 school year pursuant to Section 168.111, RSMo 1967

		SCHOOL CONTRACTS.	Supp. 2. The resolution of the school board in April 1969 to extend the superintendent's contract for the 1970-1971 school year did not result in a valid employment contract for the school year 1970-1971. 3. The School Board may refuse to renew the superintendent's contract for the school year 1970-1971 in the manner provided by Section 168.111, RSMo 1967 Supp. 4. The extent to which the school board can direct control and specify the duties of the superintendent depends on the terms of the superintendent's contract and on the provisions of Section 168.121, RSMo 1967 Supp. pertaining to the construction of such contracts.
150-70	Oct 2		Opinion letter to the Honorable George M. Cook
152-70	July 10	ROADS AND BRIDGES.	A county which acquires a road less than 30 feet wide by prescription pursuant to Section 228.190, RSMo Supp. 1967, cannot take private land from adjoining landowners in order to widen said road without instituting proceedings in the Circuit Court.
153-70	Apr 1	ELECTIONS. POLITICAL PARTIES. PRIMARY ELECTIONS. CANDIDATES.	A new political party which received more than two percent of the vote cast in the last general election (November 5, 1968) for its statewide candidate is an "established political party" and entitled to participate in the August 1970 primary elections in the state and its political subdivisions.
155-70	Mar 20	COUNTY TREASURER AND COLLECTOR. TOWNSHIP ORGANIZATION.	It is the duty of the county treasurer, ex officio collector, in a county of township organization to collect delinquent personal property taxes under Section 140.730, RSMo 1959.
157-70	Feb 9		Opinion letter to the Honorable James A. Noland, Jr.
158-70	Mar 27		Opinion letter to Ms. Jean Casey
160-70			Withdrawn
161-70	Mar 4	ELECTIONS. COUNTY CLERK.	1. The county clerk or board of election commissioners shall designate the polling places which will be used for all elections, including school elections, taking place on April 7, 1970. 2. The school board has no power to require that only one of the polling places in the school district designated pursuant to requirements of Section 111.111 will be used for voting on school issues. 3. The county clerk or board of election commissioners shall designate the judges and clerks in each polling place. 4. The judges and clerks designated by the county clerk or board of election commissioners pursuant to paragraph 2 of Section 111.111 shall conduct the election of April 7, 1970 for all subdivisions involved. 5. The school district has no power to designate polling places in the rural areas

			of the school districts in addition to those designated pursuant to paragraph 1 of Section 111.111.
162-70	Feb 9		Opinion letter to Mr. Gene Sally
163-70	Mar 18	TAXATION (CITIES, TOWNS & VILLAGES). TAXATION (SALES).	The sales tax returns made to the state director of revenue for city sales taxes are confidential and not open to public inspection.
164-70	Mar 17		Opinion letter to the Honorable William C. Phelps
167-70	Mar 25		Opinion letter to the Honorable David N. Lawson
168-70			Withdrawn
169-70	Oct 1	RETIREMENT SYSTEM. PENSIONS. STATE EMPLOYEES RETIREMENT SYSTEM.	The Missouri State Employees' Retirement System is not compelled to comply with the provisions of a power of attorney executed by one of its members to a credit union or any other lending institution for the purpose of securing a loan made by said member and should not accept the tender of the instrument by a member or the lending institution.
170-70	Nov 18		Opinion letter to Mr. Jackson A. Wright
171-70	Feb 10	ELECTIONS. SPECIAL ELECTIONS.	It is the opinion of this office that all township and ward committeemen and committeewomen in Perry and Ste. Genevieve Counties are members of the legislative district committee of the 154th legislative district. Such party legislative district committees have authority to make nominations of candidates to run under a party designation at a special election to fill a vacancy in the office of representative from such district caused by the death of the incumbent. Nominations of candidates at such election may also be made by nominating petitions of electors.
172-70	Sept 15	SHERIFFS. CRIMINAL COSTS. FEES, COMPENSATION AND SALARIES.	A sheriff's fees computed in accordance with Section 57.290, RSMo 1969, incurred when he apprehends a person, charged with the criminal offense of breaking jail after conviction, and transports that person from the county of his apprehension to that in which the offense was committed, even though such offense be for breaking jail after conviction, are properly included in those costs which may be taxed against the State pursuant to the provisions of Section 550.020, RSMo 1969.
173-70	Sept 15	INSURANCE. DIVIDENDS.	Section 375.380, RSMo 1969, making it unlawful for insurance companies to pay dividends except from surplus profits arising from the business, prohibits the payment of dividends by such companies where there is no earned surplus or undistributed profits.
174-70	Mar 24		Opinion letter to the Honorable James L. Paul

176-70	Mar 6		Opinion letter to Mr. James J. Butler
177-70	Oct 27	STATE EMPLOYEES. WORKMEN'S COMPENSATION.	A state employee is entitled to elect to receive accrued sick leave pay due him under proper regulations during a period of absence from work for which the employee is otherwise eligible for Workmen's Compensation (Section 287.100, RSMo). For the period such sick leave pay is received, Workmen's Compensation is not due the employee but is due thereafter to the extent that the period of entitlement to Workmen's Compensation exceeds the period for which sick leave pay has been received by the employee. Sick leave pay of a state employee is not to be deducted from Workmen's Compensation due after such sick leave period. If the regulations pertaining to the employee provide that sick leave is not granted for a period of absence attributable to an injury covered by the Workmen's Compensation Law, the employee has no right to elect to receive accrued sick leave pay for such a period of absence. A state employee entitled to elect to receive accrued sick leave during a period of absence in preference to Workmen's Compensation is entitled to receive the medical benefits provided for by Section 287.140, RSMo, during such period.
178-70	Feb 16		Opinion letter to the Honorable Donald J. Gralike
179-70	Mar 27		Opinion letter to the Honorable Donald L. Gann
181-70			Withdrawn
184-70	Mar 27		Opinion letter to the Honorable Hal E. Hunter, Jr.
186-70	Mar 6		Opinion letter to Mr. Harry Wiggins
187-70			Withdrawn
188-70	July 28	TAXATION (CITY SALES TAX). CITY SALES TAX.	If a sale is made by a retail merchant whose place of business is within the city limits of a city having a city sales tax, and the purchaser takes possession within the State of Missouri, then the city sales tax applies. The manner by which an order is received by a seller is irrelevant for the purposes of the city sales tax, so long as the goods are delivered within the State of Missouri. The sale is deemed to be consummated at the place of business of the seller, and this place of business is the tax situs irrespective of the method of delivery.
189-70	Apr 7	CITIES, TOWNS & VILLAGES. ZONING. PLANNING & ZONING.	An interim or temporary ordinance enacted by a fourth class city providing that all territory annexed to the city shall be automatically classified in the single family dwelling district until otherwise classified by ordinance, is a valid exercise of police power.
190-70	Mar 19	CITIES, TOWNS &	The state auditor should not make an audit of a city in which a

		VILLAGES. STATE AUDITOR. PETITIONS.	petition has been presented to him under the provisions of Section 29.230, RSMo Supp. 1967, such petition purportedly containing enough signatures to authorize him to make an audit of such city, when he also receives sworn statements from individuals who allegedly signed the original petition stating under oath that they did not sign such petition, such withdrawn signatures being of sufficient number to reduce the signatures below the number necessary to authorize the state auditor to make such audit.
192-70	Apr 3	ELECTIONS.	1. A county clerk, pursuant to Section 111.111, Senate Bill No. 134, 75th General Assembly, need not designate a polling place in each ward of a 4th class city but must designate a polling place in each precinct or election district in a 4th class city. 2. If a precinct or election district includes part of a school district lying within a city and part outside of the city, a county clerk may designate one polling place in the city within the precinct or election district. 3. The location of a polling place within a precinct or election district is within the discretion of the county clerk. 4. A county clerk pursuant to Section 111.111 is not required to establish a polling place in Ward 1 or Ward 2 of Forsyth but is required to designate a polling place in each precinct or election district in Forsyth. Whether it is necessary to establish another polling place for people living outside of Forsyth but in the Forsyth school district depends on whether these people live in the same precincts and election districts located in Forsyth.
194-70	May 19	WORKMEN'S COMPENSATION.	No clerical employee of the Division of Workmen's Compensation can be paid more than four hundred fifty dollars (\$450.00) per month. There can be no class of employees in the Division of Workmen's Compensation with any salary rate between four hundred fifty dollars (\$450.00) and eight hundred dollars (\$800.00) per month.
195-70	Mar 4	ELECTIONS. SCHOOL ELECTIONS.	1. In the election on April 7, 1970, the school board of a six director school district located in Jackson County, Missouri must conduct its election at the polling places which the Jackson County Board of Election Commissioners designate, pursuant to paragraph 1 of Section 111.111 V.A.M.S. (1969-70 Supp.), for voting on school issues. 2. A six director school district located in Jackson County, Missouri must conduct its election at each and every polling place designated by the Jackson County Board of Election Commissioners, pursuant to Section 111.111 V.A.M.S. (1969-70 Supp.), for voting on school issues.
196-70	Mar 6	DEPARTMENT OF PUBLIC HEALTH AND WELFARE.	The Division of Welfare has the authority to enter into agreements with Model City agencies to provide various types of services for

		DIVISION OF WELFARE. COOPERATIVE AGREEMENTS.	low-income residents, and that the recipients of such services may include such persons who have been or who are likely to become applicants for or recipients of such aid as well as those presently receiving welfare assistance.
197-70	Apr 15	TOWNSHIPS. OFFICERS.	1. A vacancy in the office of township trustee being also a vacancy in the board of directors of the township, is to be filled by the county court. Both the township clerk and the county clerk have authority to administer the oath of office to the newly appointed township trustee. 2. A vacancy in the office of township assessor is to be filled by action of the township board. The oath of office of such assessor may be administered by any officer having authority to administer oaths, other than the township clerk who is ex officio the township assessor.
198-70	June 11	ELECTIONS. REGISTRATION.	County registration under Chapter 114, RSMo, does apply to and should be used in a statewide special election even though other political subdivisions are holding elections at the same time thereby making the provisions of Section 111.111, Senate Bill No. 134, 75th General Assembly, applicable. However, Section 162.361, Senate Bill No. 136, 75th General Assembly, determines the extent to which county registration is applicable to school elections held in a third class county when the school elections are conducted jointly with a statewide special election pursuant to Section 111.111.
199-70	Mar 4	ELECTIONS. SPECIAL ELECTIONS. SCHOOL ELECTIONS.	1. The county clerk is not required by Section 111.111, Senate Bill No. 134 of the 75th General Assembly, V.A.M.S. (1969-70 Supp.) to designate one polling place in each of the two wards in Crane, Missouri. The residents of the City of Crane who reside in the Crane School District will vote on all propositions on which they are entitled to vote on April 7, 1970, including school issues, at the polling place or places designated by the county clerk pursuant to Section 111.111. 2. Pursuant to paragraph 2 of Section 111.111, the county clerk designates the election judges and election clerks to conduct the election on April 7, 1970, at each polling place designated by the clerk pursuant to paragraph 1 of Section 111.111. The reference to the city clerk in Section 79.030, RSMo 1959, does not apply to the election to be held on April 7, 1970. Four election judges and two election clerks, or under certain circumstances, six judges and four clerks shall be appointed for each precinct pursuant to Sections 111.181 and 111.231, Senate Bill No. 134 of the 75th General Assembly, V.A.M.S. (1969-70 Supp.). 3. There is no authority for the county clerk to furnish ballots for school elections or ballots for city elections in fourth class cities.
200-70	Mar 9	USURY.	Direct loans by Veterans Administration are not subject to Missouri

			usury statutes.
202-70	Apr 15	CORPORATIONS. FEES. CONSTITUTIONAL LAW.	1. In accordance with subsection 5 of Section 351.585, RSMo Supp. 1967, a foreign corporation seeking to do business in Missouri can be required to pay a qualification fee to Missouri on the value of all its property to be used in this state when the authorized par value capital of the corporation is less than the value of its property in this state. 2. Subsection 5 of Section 351.585, RSMo Supp. 1967, does not place a burden on interstate commerce which violates Article I, Section 8 of the United States Constitution.
204-70	Mar 4		Opinion letter to the Honorable James A. Noland, Jr.
205-70	Mar 17	HOUSING AUTHORITIES. CITIES, TOWNS AND VILLAGES.	Sections 99.010 to 99.230 of the Revised Statutes of Missouri, "The Housing Authorities Law", authorizes cities to determine and declare the need for a housing authority upon a finding that insanitary or unsafe inhabited dwelling accommodations exist in such city or that there is a shortage of safe or sanitary dwelling accommodations in such city available to persons of low income at rentals they can afford. The cities have no authority to declare a need for a limited housing authority under the provisions of the Housing Authorities Law.
206-70	Mar 19		Opinion letter to the Honorable Joe D. Holt
207-70	May 15	BANKS. BRANCH BANKS. TRUST COMPANIES.	The establishment of an office by a bank and trust company separate and apart from its main banking facility at which its trust officers are available to the public constitutes the establishment of a branch and the establishment of such a branch is not permitted under Section 362.105.
209-70	Apr 2	SCHOOLS. STATE AID.	General Assemblies meeting subsequent to the regular session of the Seventy Fifth General Assembly are not required to make any of the appropriations stated in Sections 149.010, 149.020, 149.030, 163.031, 163.036 and 163.161 enacted by the Seventy Fifth General Assembly and referred to as the School Foundation Law prior to making any appropriations for purposes lower in priority than the support of public schools as listed in Section 36, Article III, Missouri Constitution. The General Assembly must still comply, however, with Section 3(b), Article IX of the Missouri Constitution requiring that at least twenty-five percent of the state revenue be appropriated annually for the support of the free public schools.
210-70	June 2	SCHOOL ELECTIONS. ELECTIONS. BALLOTS. REGISTRATION.	1. When school elections are held in conjunction with any general, primary or special election pursuant to the requirements of Section 111.111, Senate Bill No. 134, 75th General Assembly, the procedure for handling voted ballots, poll-books and tally sheets after the polls

			have closed is set forth in Sections 111.531, 111.551, 111.561, 111.571, 111.581 and 111.591, V.A.M.S., Senate Bill No. 134, 75th General Assembly. 2. Pursuant to the requirements of Section 162.361, Senate Bill No. 136, 75th General Assembly, all school elections conducted in school districts containing a city having not less than 10,000 or more than 50,000 inhabitants should be conducted in such city in accordance with the laws regulating the registration of voters within such city. Qualified voters of such a school district residing outside the corporate limits of the city shall sign an affidavit as to their residency within the school district as required by Section 162.361.
211-70	May 6	SCHOOLS. TEACHERS.	The \$34,000 in additional school moneys, which the Macon School District R-I estimates it will receive from the state, may not be legally paid by the district to and among all teachers already under contract with the district for the 1969-1970 school year.
212-70	Apr 21	AGRICULTURE. RULES AND REGULATIONS.	Pursuant to Section 196.886(1), RSMo 1959, no person, firm, association or corporation shall manufacture and sell ice cream and related frozen food products in containers unless each container shall bear the name of the manufacturer on the body or lid of such container, and that the Department of Agriculture is not authorized to promulgate a regulation which would allow a code number or other technical symbol to be placed on the container instead of the name of the manufacturer.
213-70	May 7	RELIGION. MERIT SYSTEM. MENTAL HEALTH.	The Division of Mental Health may employ persons who have education or experience in Divinity and Theology regardless of whether or not they are ordained ministers to act as pastoral counselors under the supervision; of and as required by licensed physicians and so long as such persons do not espouse a religion or perform sacerdotal functions in their employment there is no violation of the provisions of the Missouri Constitution which prohibit support of any priest, preacher, minister or teacher as such. Such counselors as employees of the Division of Mental Health and under the Department of Public Health and Welfare are required to be under the classified merit system.
215-70	Aug 7	CITIES, TOWNS & VILLAGES. ROADS & BRIDGES. CITY STREETS.	A fourth class city which makes street improvements and repairs under Section 88.703, RSMo 1969, can defray, by proper ordinance, out of general revenue the cost of said improvements or repairs which abutts city owned property, and that all other street improvements and repairs under Section 88.703 must be paid for proportionately by the abutting property owners.
216-70	July 31		Opinion letter to the Honorable Frank L. Mickelson

217-70	May 1	CIRCUIT CLERKS.	Pursuant to the provisions of Section 55.220, RSMo 1959, the circuit clerk in second class counties is required to file with the county auditor a monthly statement showing all moneys and fees received by him by virtue of his office and all sums paid by him, to whom paid and for what purpose regardless of the source of such funds or of the persons entitled to receive payment.
219-70			Withdrawn
220-70			Withdrawn
221-70	June 16	SHERIFFS. COMPENSATION.	Sections 57.407 and 57.409, V.A.M.S., S.B. No. 165, 75th General Assembly, require that sheriffs of third and fourth class counties pay all fees collected by them after October 13, 1969, in civil matters into the county treasury regardless of whether such fees were for services by them or their predecessors in office prior to such date.
222-70	Sept 28	MERIT SYSTEM.	With respect to establishment of cafeterias and charging for meals to employees in institutions under the merit system that the Personnel Division has no authority to establish charges for such meals but that the appointing authorities do have the authority to determine whether meals will be furnished to employees and to determine the charge for such meals which is to be, with some exceptions, related to the actual cost of such meals to the state.
223-70	Mar 26	CORPORATIONS NOT-FOR-PROFIT. USURY.	Corporations organized under Chapters 352, RSMo (pro-forma decree) and 355, RSMo (general not-for-profit) can not interpose defense of usury, nor can they sue for and recover allegedly usurious interest under Section 408.050, RSMo 1959.
225-70	July 20	SCHOOLS. ELECTIONS.	A six-director school district may accept money donated to the district by a dealer in bonds for the purpose of defraying the cost of an election on the question of whether the district should incur bonded debt.
226-70	July 1	RECORDER OF DEEDS. REAL ESTATE.	The term "any instrument conveying real property or any interest therein" as used in Senate Bill No. 22, 75th General Assembly, refers to any instrument or document that passes from one party to another any legal or equitable interest in real property, whether such instrument or document be a Deed, Will or other instrument, and that such language is broad enough to cover those forms and orders of the Probate Court such as Orders of Distribution and Orders Approving Wills and Orders of the Circuit Court which do in fact convey or pass any interest in real estate.
229-70			Withdrawn
230-70	Sept 15	MOTOR VEHICLES.	1. A person operating construction equipment (not a road machine

		DRIVERS' LICENSES.	or an implement of husbandry) on a public highway is required to have a license as an operator under Chapter 302, RSMo 1969, but is not required to have a chauffeur's license. 2. A person must be sixteen years of age before he can be licensed under Chapter 302 as an operator of such construction equipment on the public highways.
231-70	Mar 17		Opinion letter to the Honorable William J. Esely
232-70	Apr 21	COUNTIES. COUNTY COURTS. NEWSPAPERS.	A county of the third class in which there is more than one qualified newspaper is not required to award the printing of the county financial statement on competitive bids.
233-70	July 1	PUBLIC FUNDS. MAGISTRATE CLERK. DEPUTY MAGISTRATE CLERK.	A deputy magistrate clerk of a third class county who loses public funds in his possession is primarily liable for the loss. In the event of his default in payment his surety is liable for said loss. Liability for the loss of the public funds also lies with the magistrate clerk and his surety.
234-70	Mar 23		Opinion letter to the Honorable Charles S. Broomfield
236-70	May 1	PUBLIC WATER SUPPLY DISTRICTS. TAXATION (EXEMPTIONS).	Public water supply districts formed under the provisions of Section 247.010 to 247.220, RSMo, are not subject to the payment of property taxes.
237-70	Apr 3	ELECTIONS. ELECTION JUDGES.	Committeemen and committee-women of both political parties are not qualified to serve as election judges and clerks under the terms of Section 111.171, V.A.M.S., 1969-70 Cum. Supp.
238-70	Apr 7	CONSTITUTIONAL LAW. ZONING. SCENIC RIVERS.	1. It is within the police power for the state to enact zoning laws restricting the use of property when reasonably necessary for the promotion of public health, safety, morals and general welfare. 2. That if such law is necessary for the promotion of the public health, safety, morals and general welfare, it does not constitute the taking of private property without due process of law in violation of Article 1, Sections 10, 26, 27 and 28 of the Constitution. 3. Whether the proposed act creating the Missouri Scenic Rivers System is reasonable and necessary for the promotion of the public health, safety, morals and general welfare depends upon the facts and evidence -- which will have to be determined by a court.
239-70			Withdrawn
241-70	Apr 3		Opinion letter to the Honorable Omer H. Avery
246-70	Apr 3	ELECTIONS. COMMITTEEMEN AND COMMITTEEWOMEN.	A person may file for election as a Committeeman or Committeewoman and also file an additional declaration of candidacy for another state or county office.

249-70	Apr 20		Opinion letter to Mr. G. L. Donahoe
251-70	Mar 25		Opinion letter to Mr. Joseph Jaeger, Jr.
252-70			Withdrawn
254-70	Oct 6	PLANNING & ZONING. COUNTY PLANNING & ZONING.	The Cass County Planning Commission may not impose regulations or require permits with respect to lands used or to be used for the raising of crops which may include grassland. This restriction is applicable with respect to land used or to be used for the enumerated purposes and does not extend to land devoted to other uses although owned by the same landowner. The county court may not require permits on the construction or alteration of farm buildings or farm structures. In determining whether to regulate the construction or alteration of a particular building or structure, the use of the building or residence as a farm building or farm structure must be determined by examining the relationship of the building to the farming activities.
255-70			Withdrawn
256-70	Aug 25		Opinion letter to the Honorable Hugh A. Sprague
257-70	June 1	PATHOLOGY. PHYSICIANS AND SURGEONS. DOCTORS.	Pathology is a branch of the practice of medicine within the provisions of Chapter 334, RSMo, and a profession under the jurisdiction of the State Board of Registration for the Healing Arts, and that an individual must be licensed by the Board before he can lawfully practice pathology. The prosecuting and circuit attorneys have the responsibility for criminal prosecutions arising out of violations of said chapter.
259-70	May 11		Opinion letter to the Honorable J. Anthony Dill
260-70	Oct 6	COUNTIES. COUNTY COURT. COUNTY FUNDS. ROADS AND BRIDGES.	County road and bridge funds cannot be transferred to the general revenue fund of the county and then used to pay the salary of the different county officials and employees for any services rendered by them.
261-70	May 13		Opinion letter to the Honorable Frank L. Mickelson
262-70	Oct 5		Opinion letter to Mr. Howard L. McFadden
265-70			Withdrawn
266-70	May 15		Opinion letter to Mr. Harry Wiggins
271-70	May 8	MUNICIPAL HOUSING AUTHORITY. LAND CLEARANCE FOR REDEVELOPMENT	Municipal housing authorities and land clearance for redevelopment authorities are authorized to agree to pay the "going federal rate of interest" on contracts entered into with the federal government for planning advances and contributions.

		AUTHORITY. INTEREST.	
273-70	Apr 23		Opinion letter to the Honorable Joe D. Holt
276-70	May 22	CONSTITUTIONAL LAW. PHYSICIANS & SURGEONS.	The provision of Section 334.031, RSMo 1959 which requires that candidates for licenses as physicians and surgeons in the State of Missouri shall be citizens of the United States is unconstitutional.
277-70	Apr 16		Opinion letter to the Honorable James S. Stubbs
278-70	Apr 27		Opinion letter to Mr. Joseph Jaeger, Jr.
279-70	June 19	INTEREST. STATE TREASURER.	In computing interest with respect to time deposits of state moneys, the State Treasurer should apply with respect to deposits held by the bank for any calendar quarter or portion of a calendar quarter, the formula rate which is applicable for the quarter in which those deposits are held. The applicable formula rate is the rate computed as set forth in the statute which is compiled from data available in the quarter prior to the quarter in which the deposits are held and which formula rate is computed within the quarter in which the deposits are held. If the maximum rate permitted by federal law is less than the formula rate then that figure must necessarily be used.
280-70	May 6		Opinion letter to Mr. Joseph Jaeger, Jr.
281-70			Withdrawn
282-70	July 1	PRIVATE WATCHMEN. POLICE. ST. LOUIS CITY.	Employees of Brink's, Inc. who act as armed guards within the City of St. Louis, must be licensed by the Board of Police Commissioners of the City of St. Louis.
286-70	July 10	SCHOOLS.	The board of education of a school district (except a metropolitan school district which is not included in this opinion) may not enter into a written contract providing for the placing of advertising posters on the interior of school buses.
287-70	May 7		Opinion letter to the Honorable John C. Vaughn
288-70	Apr 29	SOCIAL SECURITY. COUNTY ASSESSORS. COUNTY COLLECTORS.	1. The county is liable for payment of the tax on wages paid by the county to its Collector, his deputy and clerical employees, without limitation except as contained in the Social Security Act. Payment by the Collector of wages to deputy and clerical personnel from the amount the Collector is authorized to retain for deputy and clerical hire under Section 52.280, House Bill No. 399, 75th General Assembly, is payment by the county insofar as social security is concerned. 2. The county is liable for payment of tax on wages paid by the county to clerical and stenographic assistants of a third class

			county assessor.
291-70	Apr 10		Opinion letter to the Honorable William Y. McCaskill
292-70	July 28	ELECTIONS. CITY ELECTIONS. CITIES, TOWNS AND VILLAGES.	If the City of Kirksville schedules an election on the same date as a state-wide primary election, the provisions of Section 111.111, RSMo 1969 are automatically applicable. Furthermore, the Adair County Court has no power or authority to prevent the City from scheduling an election on the same day as a statewide primary election.
293-70	June 1	CONSTITUTIONAL LAW. APPROPRIATIONS. SCHOOLS. STATE UNIVERSITY. STATE COLLEGES.	The term “public education” as used in Article III, Section 36 of the Missouri Constitution includes within its meaning and refers to appropriations for state colleges, universities, public schools and junior college districts.
294-70	July 17		Opinion letter to the Honorable E. J. Cantrell
296-70	Aug 21	COUNTIES. CITIES, TOWNS, AND VILLAGES. TAXATION (CITIES TOWNS AND VILLAGES). COOPERATIVE AGREEMENTS.	The county court of Clay County and a municipality of said county may enter into a contract, under the cooperative agreement statute (Section 70.220, RSMo 1969) whereby the municipality may use the county computer and the tax information stored thereon, for the purpose of mechanically producing a tax statement for each individual taxpayer.
297-70			Withdrawn
298-70	Oct 1	MOTOR VEHICLES. LICENSES. MOTOR VEHICLE LICENSES.	A resident of Missouri who is a partner of a Kansas firm that is a registered motor vehicle dealer in Kansas may operate a motor vehicle owned by the Kansas firm in Missouri using only the Kansas dealership license plates.
300-70	July 2	SCHOOLS. CITIES, TOWNS AND VILLAGES. BONDS. ELECTIONS.	There is no procedure which would authorize setting aside a school levy election because of a shortage of ballots.
301-70	Oct 27	ELECTIONS. ELECTION JUDGES. COMMITTEEMEN AND COMMITTEEWOMEN.	Section 111.171, RSMo 1969, prohibits committeemen and committeewomen from serving as election judges and clerks (1) in any election conducted by a county clerk or a board of election commissioners or (2) in any election in which a countywide proposition is on the ballot or (3) in any election in which candidates for county office are on the ballot.
302-70	May 25	SCHOOLS. STATE AID.	Section 163.081, RSMo 1967 Supp., expresses the intent of the legislature to make three distributions of moneys out of the State

		APPROPRIATIONS. COMPTROLLER.	Public School Fund and that, under the circumstances set forth in your opinion request, it would not be in substantial compliance with this intent to make a supplementary distribution of state school moneys after the March 15th distribution but before the September 15th distribution.
304-70	May 7	SHERIFF. COMPENSATION.	A sheriff appointed trustee to execute a deed of trust pursuant to Section 433.340, RSMo 1959, acts in his official capacity and must pay all fees and compensation collected by reason thereof into the county treasury in counties of the third and fourth class under the provisions of Paragraph 3 of Section 57.407 and Paragraph 3 of Section 57.409, both as amended by House Bill No. 165 of the 75th General Assembly. When a deed of trust provides that in the event the named trustee shall refuse or fail to act, the then sheriff of the county shall execute the trust, the sheriff is not acting officially but in his private capacity, and such compensation as he receives for the services is not required to be paid into the county treasury.
306-70	July 28	ELECTIONS. ELECTION JUDGES. ELECTION CLERKS. COMPENSATION.	Section 111.241, RSMo 1969, applicable to certain election judges and clerks, does not limit the compensation for such judges and clerks to \$12.00 per day, but provides that the compensation shall be at least \$12.00 per day.
307-70	June 25	TAXATION (EXEMPTIONS).	Under Article X, Section 6 of the Constitution and Section 137.100, RSMo Supp. 1967, a building in the course of construction intended to be used for charitable purposes but not so used at the time fixed for assessment of taxes is not exempt from taxation.
308-70			Withdrawn
311-70	Sept 25	TAXATION (INTANGIBLE).	1. Time charges in excess of the cash sale price under a retail charge agreement or a retail time contract, which establishes a time sale price as defined in Section 408.250, RSMo 1969, do not constitute "yield" within the meaning of the Intangible Personal Property Tax Law. 2. The full time sale price under a retail charge agreement or a retail time contract, including the cash sale price and the time charge as defined in Section 408.250, RSMo 1969, is subject to the Missouri sales tax provided in Chapter 144, RSMo 1969.
312-70	Nov 4	SCHOOLS. INSURANCE.	All functions which a school district is authorized to perform are "governmental" functions and the school district is not liable for its negligence while performing those functions. Therefore, a school district may not expend public funds to purchase liability insurance to protect itself from liability resulting from authorized functions of the district such as allowing its swimming pool and auditorium to be used by non-profit organizations, repairing automobiles through a

			district's Vocational Technical School, and licensing concessionaires at athletic events.
313-70	June 3	AIR POLLUTION. AIR CONSERVATION.	The Missouri Air Conservation Commission has the authority to grant variances from the provisions of Regulation X, Section B, Paragraph 1, of the "Air Quality Standards and Air Pollution Control Regulations for the St. Louis Metropolitan Area."
314-70			Withdrawn
315-70	June 12		Opinion letter to the Honorable James L. Paul
316-70	May 15		Opinion letter to the Honorable Kenneth J. Rothman
317-70			Withdrawn
318-70	Dec 1		Opinion letter to the Honorable Clarence W. Hawk
320-70	Aug 21	ROADS AND BRIDGES. SPECIAL ROAD DISTRICTS.	(1) County Aid Road Trust Funds derived from motor fuel taxes may be expended by a county court on roads located in a special road district. (2) Such funds may not be expended by the county court on bridges located in a special road district. (3) A county court cannot be compelled to spend such funds in a special road district.
321-70	Oct 5		Opinion letter to the Honorable Don W. Kennedy
322-70	Aug 31	MOTOR VEHICLES. DRIVERS' LICENSES.	A person, resident or nonresident, whose Missouri operator's license has been revoked by reason of accumulation of points as provided by Section 302.304(3), RSMo 1969, cannot legally operate a motor vehicle in the State of Missouri under a license issued by another state.
323-70	July 22	CITY COLLECTOR. CITY ASSESSOR.	When the office of city assessor and city collector are both elective offices under the ordinances of a city of the fourth class the duties of the office of city assessor are not repugnant or incompatible with those of the city collector and one person may hold both offices at the same time.
325-70			Withdrawn
326-70	Sept 28	REAL ESTATE BROKER. REAL ESTATE COMMISSION. LICENSES. CRIMINAL LAW.	The offering of free radios or free dinners by a licensed real estate broker in order to induce the public to attend a meeting at which said broker solicits or offers for sale real property in a development within or outside the State of Missouri constitutes soliciting or offering to sell real property by offering prizes for the purpose of influencing a purchaser or prospective purchaser of real property is in violation of Section 339.100(11), RSMo 1969.
327-70	Aug 6	DIVISION OF MENTAL	Persons committed to state mental hospitals pursuant to provisions

		HEALTH.	of Section 552.040, RSMo 1969, relating to the commitment and release procedures of persons acquitted on grounds of mental disease or defect, may be placed on convalescent status by the heads of such facilities pursuant to the provisions of Section 202.830, RSMo 1969, and the heads of such facilities are not required to apply for a "conditional" release by the court where the committed person was tried. The courts have no power to restrict or abrogate the authority of the heads of facilities to place such a person on convalescent status under the provisions of Section 202.830 although such heads of facilities cannot grant a final release under that section but must obtain an order of the court under Section 552.040 to release the committed person unconditionally.
328-70			Withdrawn
329-70	Sept 30	MARRIAGES. RECORDER OF DEEDS.	The marriage license form provided in Section 451.080, RSMo 1969, is not mandatory but may be revised in order to accommodate the provisions of Section 451.100, RSMo 1969, which authorizes religious organizations of this state to solemnize marriages. When a marriage is solemnized by a religious organization and not by a minister or other authorized individual such organization must designate some person to certify that the marriage was performed by the religious body according to its regulations and customs and that at least one of the parties thereto is a member of such organization.
331-70	May 26	CRIMINAL COSTS. COMPTROLLER.	An information which alleges that the defendant did: "willfully, unlawfully, feloniously and with malice aforethought", but does not contain the phrase "on purpose" is insufficient to charge a violation of Section 559.180 RSMo 1959 and the State of Missouri is not liable for payment of the costs in such a case.
332-70	June 8	SOIL AND WATER COMMISSION. COUNTY COURTS. TAXATION.	When the governing body of a watershed subdistrict levies a tax pursuant to Sections 278.240 and 278.250, RSMo Supp. 1967, and certifies the levy to the county court, the county court and appropriate county officials must levy and collect the tax.
333-70	May 28	METROPOLITAN SEWER DISTRICT.	The Metropolitan St. Louis Sewer District has authority to spend money for planning and surveys outside its boundaries.
334-70	July 31	ASSESSMENT OF REAL PROPERTY. ASSESSORS. REAL PROPERTY. TAXATION.	An assessor cannot assess real property in subsequent years for any prior year in which such real estate was assessed even though the assessor was not aware of the fact that improvements were on such land on January 1 of the prior year when the land and the improvements were owned by the same person as of January 1 of the prior year.

334a-70	Sept 16		Opinion letter to Mr. Jim T. Reid
335-70	July 1	FIRE PROTECTION DISTRICTS.	A fire protection district may be formed in a third class county under Chapter 321, RSMo as amended. A fire protection district cannot be formed to encompass an area or territory in more than one county.
337-70			Withdrawn
340-70	May 22	SCHOOLS. APPROPRIATIONS. CONSTITUTIONAL LAW.	1. That the Governor may not constitutionally veto an appropriation bill for free public schools. 2. That the Governor may not constitutionally veto any portion of an appropriation bill for free public schools. 3. That the Governor may not reduce any portion of an appropriation for public schools. 4. That the Governor, at his discretion, may constitutionally control by allotment or other means and thereby reduce the expenditure of funds below their appropriations only when the actual revenues are less than the revenue estimates upon which the appropriations were based. 5. The phrase "not reduce" for free public schools, as found in Article IV, Section 28, Constitution of Missouri, 1945, is a prohibition against executive reduction of any amount appropriated by the Legislature to free public schools. 6. The phrase "revenue estimates upon which appropriations were based" refers to those amounts as set forth in the budget submitted to the General Assembly, except in those instances in which the General Assembly has by its appropriation bill, set forth its estimate of revenues for the period during which the appropriation was made, or, if not specifically stated in the appropriation bills, then the total of the appropriations as passed by the Legislature, would represent the estimated revenue upon which appropriations were based. 7. That the Governor may control the expenditure rates without being required to reduce all appropriations by a pro rata percentage.
340a-70	Mar 28		Opinion letter to the Honorable Christopher S. Bond
342-70	May 22	ELECTIONS. ABSENTEE VOTING. BALLOTS.	1. The terms "nonpartisan" and "independent" as applied to candidates for office, are synonymous and when necessary for a ballot to be furnished at a primary election at which independent or nonpartisan candidates are running, such ballot is a "nonpartisan" ballot. 2. Nonpartisan ballots are not to be furnished at a primary election where there is not more than one candidate for any office on the nonpartisan ticket if such ticket did not receive more than 5% of the vote for governor at the last preceding election for governor unless 10% of the voters voting at the last preceding election for governor petition for a ballot. 3. War ballots do not contain a nonpartisan column when there is not more than one

			candidate for any office on the nonpartisan ticket if such ticket did not receive more than 5% of the vote for governor at the last preceding election for governor unless prior to the printing of the war ballots 10% of the voters voting at the last preceding election for governor petition for a ballot. 4. An individual who receives a nonpartisan ballot at a primary election cannot receive a party ballot at such primary election.
344-70	Oct 28	FOREST CROP LAND. TAXATION (EXEMPTION).	Article X, Section 7 of the Constitution of Missouri does not permit the Legislature to grant partial relief from taxation of forest crop land for a period longer than twenty-five years or to extend or renew such classification of forest crop land beyond a period of twenty-five years.
346-70			Withdrawn
348-70	Sept 4	TAXATION (INTANGIBLE). BLIND PERSONS.	The blind pension fund of the State of Missouri is not entitled to share in the intangible personal property tax collected by the state.
349-70	May 27		Opinion letter to the Honorable Richard Southern
351-70	Aug 3	LABOR. PREVAILING WAGE.	A public school district which constructs a school building under its own supervision and control without contracting for construction of such building is not required to pay the "prevailing wage" rates determined by the Department of Labor and Industrial Relations.
352-70	June 2		Opinion letter to the Honorable Allen S. Parish
353-70	June 26		Opinion letter to Mr. Robert L. Dunkeson
354-70			Withdrawn
355-70	Aug 18	MOTOR VEHICLES. LICENSES. MOTOR VEHICLE LICENSES.	A member of an automobile dealer's family may legally operate a vehicle with a dealer's license plate only if the vehicle is held for sale by the dealer and the family member is an officer or employee of the dealership. If the family member is an officer or employee of the dealership, such vehicle may be used not only for business purposes but also for private reasons.
356-70			Withdrawn
358-70	Sept 4		Opinion letter to the Honorable George W. Parker
359-70			Withdrawn
362-70	June 29	LIQUOR. INTOXICATING LIQUOR.	The 1970 census population figures become effective on July 1, 1971, for the purpose of determining whether or not a license to sell liquor by the drink at retail, other than malt liquor containing

			alcohol not in excess of five percent, for consumption on the premises can be issued in, any city having a population of under twenty thousand after the 1970 census. Any license authorizing the sale of intoxicating liquor by the drink at retail for consumption on the premises, other than malt liquor containing alcohol not in excess of five percent, expiring on June 30, 1971, in such a city cannot be renewed unless a majority of the qualified voters of that city have previously authorized such licenses through the provisions of the local option laws of the Liquor Control Act, or until they subsequently do so.
363-70	May 28		Opinion letter to Mr. Hubert Wheeler
365-70	June 5	SCHOOLS. TAXATION (SCHOOLS). CONSTITUTIONAL LAW.	Pursuant to the terms of Article X, Section 11(c) of the Missouri Constitution and Section 164.021, RSMo 1967 Supp., a tax rate approved by two-thirds of the qualified electors voting thereon pursuant to the first clause of Section 11(c) is a valid increase of the maximum rate of taxation permitted by Section 11(b) of Article X of the Missouri Constitution for the period authorized by the voters (not to exceed four years) and, at the end of the authorized period (not to exceed four years), the increased tax rate expires. The rate for the next succeeding year will be the rate imposed by the school board of the district which cannot exceed the limitations contained in Section 11(b), Article X, Missouri Constitution unless the qualified voters of the district have authorized an increase pursuant to the provisions of Section 11(c) Article X, Missouri Constitution and Section 164.021, RSMo 1967 Supp. With reference to the Kirkwood School District R-7, the tax rate of \$4.47 approved by the voters in 1969, is effective for only one year. The tax rate for subsequent years will be limited by provisions of Section 11(b), Article X, Missouri Constitution, to a maximum of \$1.25 on hundred dollars assessed valuation unless the voters of the district authorize an increase in this basic rate pursuant to the provisions of Section 11(c) of Article X, Missouri Constitution and Section 164.021, RSMo 1967 Supp.
366-70	June 8	BAIL. POLICE OFFICER.	An arresting officer who has no authority to accept bail is not authorized to accept a driver's license in lieu of bail under Section 544.045, RSMo Supp. 1967, from a person arrested for a traffic violation.
367-70	June 1		Opinion letter to Mr. Hubert Wheeler
368-70	June 26		Opinion letter to the Honorable Thomas I. Osborne
369-70	Aug 13	TAXATION (SALES AND	The Missouri sales tax is not applicable to the sale of books by

		USE). TAXATION (EXEMPTIONS).	individuals made through the Raytown Area PTA Council sponsored Student Used Book Exchange.
371-70	Oct 2	SCHOOLS. TEACHERS.	A teacher who has served only five successive years in the same school system has not achieved "permanent teacher" status pursuant to the definition of "permanent teacher" in Section 168.104(4), RSMo 1969, and therefore, such a teacher would not gain "permanent teacher" status upon being reemployed by that same school district for the second successive year.
372-70	July 27		Opinion letter to the Honorable D. R. "Ozzie" Osbourn
373-70	June 5		Opinion letter to the Honorable Albert F. Turner
374-70	July 9		Opinion letter to the Honorable Phil Snowden
375-70	June 11	GENERAL ASSEMBLY. CONSTITUTIONAL LAW. REFERENDUMS.	Once a measure is referred to the electorate, the General Assembly has no power to repeal the measure. The Secretary of State must continue to perform his statutory duties with respect to having the referred measure submitted to the electorate even though the General Assembly has attempted to repeal the measure.
378-70	June 23		Opinion letter to Mr. B. W. Robinson
379-70	June 17		Opinion letter to the Honorable James C. Kirkpatrick
380-70			Withdrawn
381-70	June 19	MUNICIPAL AIRPORTS. CITIES, TOWNS & VILLAGES. AIRPORTS. COOPERATIVE AGREEMENTS.	The mayor of a constitutional charter city may not, without an enabling ordinance, contract with an adjoining state for the construction of an airport.
383-70	July 21	ELECTIONS. PRIMARY ELECTIONS. CHALLENGERS.	1. Precinct election judges in Kansas City can recognize an inside challenger for a political party who is vouched for by judges representing that party or by persons present belonging to that party where the challenger with the duly signed credentials of the party chairman has not put in an appearance at the polling place. 2. A challenger recognized by the election judges maintains his position as challenger only until such time as a challenger with credentials from the party chairman presents himself at the polling place. 3. A form purporting to be an appointment of an inside challenger by the election judges for the rest of the election day because no authorized inside challenger has presented himself at

			the polling place does not meet legal requirements.
385-70	July 21		Opinion letter to the Honorable James P. Mulvaney
386-70	Sept 18	COUNTY COLLECTORS. COMPENSATION. CONSTITUTIONAL LAW.	Collectors of third class counties wherein the total amount of taxes levied for any one year exceeds four million dollars can retain all commissions and fees earned by them.
387-70	Aug 7	COUNTY COLLECTOR. COUNTY CLERK. COMPENSATION.	1. A person appointed by the county clerk under Section 52.180, RSMo, in case of death, resignation, removal or other disability of a county collector to examine the tax books, ascertain the amount remaining uncollected and make out a correct abstract of the same is entitled to be compensated for his services by the county. 2. Persons appointed by the legal representative or sureties of the collector to perform such duties are not entitled to be compensated by the county.
388-70	June 19	CONSTITUTIONAL LAW. EMERGENCY CLAUSE. SCHOOLS.	Section A of Senate Bill No. 3, Third Extraordinary Session, 75th General Assembly, qualifies under Sections 29 and 52(a) of Article III of the Missouri Constitution as a valid emergency clause and Senate Bill No. 3 will become effective upon approval by the Governor.
389-70	Oct 28	TAXATION (INCOME). TAXATION (EXEMPTIONS).	(1) A corporation whose only activity is the investment or reinvestment of its own funds in securities which are obligations of the United States Government or its instrumentalities is not subject to Missouri Income Tax by reason of the provisions of Section 143.040.1, RSMo 1969, and the income thereof is exempt under Section 143.150(5), RSMo 1969. (2) Dividends paid to stockholders of the corporation described in (1) are to be included in taxable income under the provisions of Section 143.100, RSMo 1969.
390-70	Sept 28		Opinion letter to the Honorable Vic Downing
391-70			Withdrawn
393-70	July 27		Opinion letter to the Honorable Frank Conley
394-70			Withdrawn
394a-70	Sept 25	SCHOOLS.	Pursuant to Section 160.051, RSMo 1969, any child whose sixth birthday is before the first day of October after the first day of a school term shall be deemed to be six years of age for the purpose of determining eligibility for admission to school. A rule of a school board which prevents any child whose sixth birthday occurs before October first from attending school is unauthorized, invalid and void. A school board may use reasonable discretion in selecting the date which it will use to determine the age eligibility of children for the district's program of gratuitous education of children between five and six years of age. A school board may decide upon an age

			determination date which would permit children who are less than five years of age on the first day of the school term to enroll in such classes. However, only those children who have reached the age of five prior to October first after the first day of the school term may be counted in determining "average daily attendance" for state aid purposes.
399-70	July 9		Opinion letter to the Honorable Earl L. Schlef
400-70			Withdrawn
401-70	June 30		Opinion letter to the Honorable R. J. King, Jr.
402-70	Sept 25	CORPORATIONS. CONSTITUTIONAL LAW.	Article XI, Section 7 of the Constitution of Missouri and Section 351.160, RSMo 1969, do not render void bonds which are sold at less than par or face value where the bonds are issued to promote the legitimate business of the corporation and the discount price is arrived at after bona fide arms length negotiations between the corporation and the purchaser and is the best price that the corporation in good faith could obtain.
403-70	June 24		Opinion letter to Mr. Hubert Wheeler
405-70	July 31		Opinion letter to the Honorable Hardin C. Cox
406-70	Sept 30		Opinion letter to the Honorable Jack K. Smith
407-70	July 9		Opinion letter to Mr. Herbert Wheeler
408-70	Dec 8	ELECTIONS. REGISTRATION.	1. When Henry County, by a vote of the people, adopted the provisions of Chapter 114, RSMo for voter registration, voter registration applied to the City of Clinton in all state and county primary, special and general elections. 2. The City of Clinton, Henry County, Missouri may adopt voter registration for all municipal elections in the manner as provided for in Section 114.047, RSMo, and it would be the duty of the county clerk to furnish the proper registration records to the city election officials.
409-70	Aug 7		Opinion letter to the Honorable Arthur T. Stephenson
410-70			Withdrawn
411-70	Oct 6	ARREST. POLICE. CITY POLICE. CRIMINAL PROCEDURE. CITIES, TOWNS & VILLAGES.	A police officer from a fourth class city may arrest for violations of state traffic laws occurring within the city limits and may file a complaint based upon this violation in the magistrate court; a police officer from a fourth class city, possessed of knowledge that a recent felony has been committed, may arrest without a warrant anyone he has reasonable grounds to believe has committed the

			offense; the arrest for this felony may occur outside the city limits; a police officer from a fourth class city does not have the power to make an ordinance violation arrest outside the city limits; and a fourth class city police chief may not take bond for arrests made without a warrant for offenses that occur within the city limits.
412-70	Sept 16	COSMETOLOGY. WIGS.	1. Department store sales personnel who receive compensation either from the store or from the customer for combing, brushing and arranging individuals' hair in the process of selling or servicing wigs are practicing the occupation of hairdresser within the meaning of Section 329.020, RSMo 1969, and must obtain a certificate of registration from the State Board of Cosmetology. 2. The department store in which the occupation of hairdresser is practiced must also obtain a certificate of registration from the State Board of Cosmetology.
413-70	Sept 18	ASSESSORS. COMPENSATION. DEPUTIES. SALARIES.	See: State ex rel. Lack v. Melton, 629 S.W.2d 302 (Mo. banc 1985). With respect to Senate Bill No. 1 of the Third Extra Session, 75th General Assembly: 1. Pursuant to the provisions of subsection 3 (Section 53.071, RSMo) of said bill, the salary of a county assessor whose year of incumbency begins September 1, 1970, would be computed on the basis of the assessed valuation of the county for the year 1969 and the salary for each succeeding year is to be computed on the basis of the assessed valuation of the county for the preceding year. 2. In counties of the second, third, and fourth class, the salary of each clerk and deputy appointed by the county assessor subject to the approval of the county court shall be paid entirely by the county. 3. The provisions of subsection 3 of said bill (Section 53.081, RSMo) requiring the assessor of each county, except counties of the first class having a charter form of government, to verify ten sales of real property made in the county each month and make a report to the State Tax Commission do not apply to township assessors in counties having a township form of government. 4. The provisions of subsection 3 of said bill (Section 53.091, RSMo) requiring the assessors of this state to attend a course of study as prescribed by the State Tax Commission includes township assessors. 5. The provisions of subsection 3 (Section 137.330, RSMo) of said bill are applicable only to counties of the first class.
414-70	July 13		Opinion letter to the Honorable Robert E. Young
415-70	Sept 28	RECORDER OF DEEDS. REAL PROPERTY. FEES.	Instruments subject to the one dollar user fee provided by Section 59.319, RSMo 1969, include warranty deeds, quit claim deeds, trustee's deeds, collector's deeds, executor's deeds, administrator's deeds, guardian's deeds, sheriff's deeds in partition, highway deeds,

			cemetery deeds, tax deeds, wills which devise real property, leases of real property, all instruments which convey easements, patents of land, probate and circuit court decrees which convey real property interest, and all distributions of the probate court involving real property. Instruments which do not convey an interest in real property and are not subject to the user fee include deeds of trust, deeds of release (full and partial), uniform commercial code security instruments involving fixtures and crops, instruments which release uniform commercial code security interests, probate and circuit court decrees which do not convey real property interests, distribution orders which do not involve real property, leases on personal property, affidavits, surveys, plats (where easements are not established), patents on inventions, death certificates, marriage licenses, powers of attorney, articles of incorporation, articles of dissolution, resolutions and statements.
417-70	Sept 11		Opinion letter to the Honorable J. Anthony Dill
420-70	July 27		Opinion letter to the Honorable James C. Kirkpatrick
421-70	Aug 3	WORKMEN'S COMPENSATION. FIREMEN.	The provisions of Sections 87.005 and 87.006, RSMo 1969, relating to impairment of health of firemen, do not apply to the Missouri Workmen's Compensation Law.
422-70	July 20		Opinion letter to the Honorable Patrick J. O'Connor
423-70	Oct 19		Opinion letter to the Honorable Hugh A. Sprague
424-70	Nov 18		Opinion letter to Mr. Lee E. Norbury
425-70	Aug 17		Opinion letter to the Honorable Carl R. Noren
426-70	July 28		Opinion letter to the Honorable Marvin L. Dinger
427-70	July 27		Opinion letter to the Honorable Gene Hamilton
428-70	Sept 11	COUNTY JUDGES. CRIMINAL LAW. CONFLICT OF INTEREST.	Section 49.140, RSMo 1969, would be violated if the financial statement of the county or any legal notices of the county were printed at the expense of the county in a newspaper owned by a member of the county court or his wife.
430-70	Sept 30		Opinion letter to Dr. Robert T. Foster
431-70	Aug 25		Opinion letter to the Honorable Phil Snowden
432-70	July 31		Opinion letter to Mr. Gene Sally
433-70	Nov 25	SCHOOLS.	Two or more three-director (common) school districts cannot organize into a six-director district.
434-70	Aug 3	STATE AUDITOR.	(1) It is the duty of the State Auditor to audit the accounts of the

		COUNTY AUDITS.	various county officers, in counties of the third and fourth class, supported in whole or in part by public moneys, at least once during the term for which any county officer is chosen. (2) The time of making such audit during the term of each county officer shall be as near the expiration of the term of the county officer as the auditing force of the State Auditor will permit, as determined by the State Auditor.
437-70	Aug 31	BANKS.	The designation of the Grandview Bank as a federal depository and financial agent pursuant to federal law to perform functions designated by the Secretary of the Treasury is a matter controlled by federal law and permission to establish this facility is not necessary from the Division of Finance of the State of Missouri. The establishment of this facility, therefore, is dependent upon appropriate decision by the federal authority and the Missouri prohibition against branch banking is not applicable.
438-70	Oct 28	FIRE PROTECTION DISTRICTS. AMBULANCES.	Fire protection districts organized under the provisions of Section 321.510 to Section 321.715, RSMo 1969, continue as legal entities although the statutes under which they were organized have been repealed. Emergency ambulance service provided for under Section 321.225, RSMo 1969, furnished by the district must be furnished for the entire district and not for the portion of the district within one county.
440-70	Nov 10	ELECTIONS. INITIATIVE & REFERENDUM.	When initiative petitions proposing a constitutional amendment are filed with the Secretary of State and found to contain insufficient signatures to place the proposition on the ballot, such petitions cannot be returned to the circulators; and such petitions, which provided for submission of the proposed amendment at the November 3, 1970 general election or at a special election to be called by the Governor, may not be counted toward placing a proposition on the ballot at a general election or a special election to be held after the general election on November 3, 1970.
441-70	Nov 4	FOREST CROPLAND.	If the value of the land alone exceeds ten dollars per acre such land may not be classified as forest cropland for tax relief under the State Forestry Law, Chapter 254, RSMo 1969.
442-70	Oct 19		Opinion letter to Mr. Joseph B. Reichart
444-70	Aug 14	CORONERS. COUNTY CORONERS. FEES, COMPENSATION, AND SALARIES.	A coroner of a second class county is paid an annual salary in lieu of fees and is required to collect on the behalf of the county all fees for official services except such fees as are chargeable to the county.
445-70	Sept 16	STATE AUDITOR.	The State Auditor must audit the account of each county officer,

		COUNTY OFFICERS.	supported in whole or in part by public moneys, at least once during the term of each such officer. Thus, the accounts of an officer chosen for a two year term must be audited at least once every two years and the accounts of an officer chosen for a four year term must be audited at least once every four years. Such audit shall be made as near the expiration of the term of the officer as the auditing force of the State Auditor will permit.
446-70	Sept 4	SCHOOLS. ELECTIONS. TAXATION (SCHOOLS).	School Board can call repeated elections to increase school tax levy. Board can issue statements giving information as to necessity of tax increase. Board must open and operate schools even though it has insufficient funds to operate for nine month period.
447-70			Withdrawn
447A-70			Withdrawn
448-70	Aug 17		Opinion letter to the Honorable James L. Paul
450-70	Dec 1	DIRECTOR OF REVENUE. PURCHASING AGENT.	The Director of Revenue has authority under Section 32.050, RSMo 1969, to enter into a contract with a private corporation under which contract employees of the corporation key punch data necessary for income tax refunds. Any such contract must be awarded by the State Purchasing Agent in accordance with Section 34.030, RSMo 1969. The furnishing of information obtained from income tax returns to such corporate employees would not violate the provisions of Section 143.270, RSMo 1969, which provides that the contents of state income tax returns shall be confidential. The persons performing the key punching services would be subject to the statutory prohibitions against divulging information obtained by income tax returns.
451-70	Sept 4	ELECTIONS. POLL BOOKS. PUBLIC RECORDS.	A person inspecting a poll book as provided in Section 111.581, RSMo 1969, may make photostatic copies of the list of voters in the poll books.
452-70	Dec 9	STATE PURCHASING AGENT.	The Purchasing Agent is required to determine whether bids for supplies to be purchased by the State of Missouri show that the delivered price of a firm, corporation or individual not doing business as a Missouri firm, corporation or individual is the same or less than the bid of a Missouri firm, corporation or individual and if he determines that a Missouri bidder has submitted an equal bid, in competition with an out-of-state bidder, then the Purchasing Agent is required to prefer the Missouri bidder. The Purchasing Agent is not permitted to accept a higher bid from a Missouri bidder on the grounds that the economic interests of the state would be furthered by patronizing a bidder doing business as a Missouri firm,

			corporation or individual.
453-70	Oct 30		Opinion letter to Mr. Robert L. Hyder
454-70	Sept 11	CONSTITUTIONAL LAW. CONSTITUTIONAL AMENDMENT.	The effective date of the Judicial Reform Amendment, Senate Joint Resolution No. 16, 75th General Assembly, is January 1, 1972.
455-70	Aug 21		Opinion letter to the Honorable G. William Weier
456-70	Oct 14	MOTOR VEHICLES. STATE UNIVERSITY. ROADS AND BRIDGES.	The County Court of St. Charles County does not have the authority to set speed limits on county roads not within the limits of any incorporated city, town or village, lower than that provided in Section 304.010, RSMo 1969, for the reason that St. Charles County, although a second class county, does not have a population of 125,000 residents and the extension centers located in that county do not constitute a "state university" within the meaning of Section 304.010 5., RSMo 1969.
458-70	Sept 17		Opinion letter to the Honorable Charles S. Broomfield
458a-70			Opinion letter to the Honorable Charles S. Broomfield
459-70	Aug 21		Opinion letter to the Honorable Carl D. Gum
461-70	Sept 15	ELECTIONS. BALLOTS.	Section 111.591, RSMo 1969, does not authorize the prosecuting attorney or other public officer to inspect ballots in the custody of the county clerk or board of election commissioners, unless some judicial proceeding, grand jury investigation, or other investigation authorized by law is pending.
463-70	Aug 21		Opinion letter to the Honorable G. William Weier
469-70	Sept 11		Opinion letter to the Honorable R. J. King, Jr.
470-70	Sept 4	MOTOR VEHICLES. CRIMINAL LAW. DRUNKEN DRIVING.	Section 564.440, RSMo 1969, does not require operation of a motor vehicle upon a public highway as a condition precedent to a charge of operating a motor vehicle while in an intoxicated condition.
472-70	Oct 2		Opinion letter to the Honorable Robert Pentland
473-70			Withdrawn
475-70	Oct 20	COUNTIES. COOPERATIVE AGREEMENTS. CITIES, TOWNS & VILLAGES.	1. A third class county may enter into a cooperative agreement for operation of a common dumping ground with fourth class municipalities of such county. 2. A third class county may enter into a cooperative agreement for operation of a common dispatch service for the peace officers of the county and contracting municipalities. 3. Fourth class cities may enter into a cooperative agreement for a common sewer system.

476-70	Oct 28	OFFICERS. LEGISLATURE. LEGISLATORS. CONSTITUTIONAL LAW. CONFLICT OF INTEREST.	1. A state representative who has a permit to own and operate an official motor vehicle inspection station is not an officer or employee of the state and does not violate the provisions of Article III, Section 12 of the Constitution of Missouri. 2. A state representative who has a permit to own and operate an official motor vehicle inspection station does not violate the provisions of Section 105.490, RSMo.
477-70	Sept 25		Opinion letter to Mr. Joseph Jaeger, Jr.
478-70	Sept 11		Opinion letter to the Honorable Thomas B. Burkemper
479-70	Dec 10	CITIES, TOWNS AND VILLAGES. CITY ADMINISTRATOR.	A city administrator appointed under the provisions of Section 77.042 to Section 77.048, RSMo 1969, may be authorized by the governing body of a third class city to appoint and discharge any employees of the city even though such employees operate under the Park Boards, the Public Work Boards or the police merit system. The city council of a third class city does not have authority to give the city administrator general superintending control of the administration and management of the departments under the control of the various boards such as the Park Board or the Board of Public Works or to give the city administrator any control beyond that heretofore exercised by the mayor himself.
482-70			Withdrawn
484-70	Sept 30		Opinion letter to Mr. Hubert Wheeler
489-70	Oct 20	STATE AID. JUNIOR COLLEGES. SCHOOLS.	A junior college district has no authority to conduct classes outside of its district boundaries and is not, therefore, entitled to receive state aid for nonresidents of the district enrolled in classes outside of its district boundaries even though they may be Missouri residents.
490-70	Sept 11		Opinion letter to the Honorable Peter H. Rea
491-70	Nov 19	CITIES, TOWNS AND VILLAGES. COUNTIES.	Section 67.400, RSMo 1969, authorizes the governing body of any city, town or village to enact ordinances that provide for the demolition of buildings and structures within the corporate limits of such city, town or village which are detrimental to the health, safety or welfare of the residents and declared to be a public nuisance.
492-70	Oct 2		Opinion letter to the Honorable Raymond Howard
493-70	Oct 30	ELECTIONS.	(1) There is no law regulating or prohibiting the hiring of persons to haul voters to the polls in a primary or general election in a third class county. (2) In a county of the third class, each party committee may select a person in accordance with its bylaws to witness the counting of the ballots and such person should be

			admitted to the room where the ballots are being counted by the judges of the election if they are satisfied such person has been selected by the party committee.
498-70			Withdrawn
501-70	Sept 29	SCHOOLS.	<p>(1) Some or all of the teachers of the St. Charles School District may be placed on a leave of absence pursuant to the provisions of Section 168.124, RSMo 1969, of the Teacher Tenure Act, if the school board of the St. Charles School District reasonably concludes that such action is necessary due to the financial condition of the school district. (2) In determining whether the schools of a district must close due to lack of funds, a school board must take into consideration all available income, including any school money received from the State of Missouri. However, a school board may consider any fixed expenses it will have after school is closed in determining when the available funds of the district have been exhausted. (3) Section 163.091, RSMo 1969, provides the sole remedy available to the state to recover from a school district the excess amount of state school money paid to the district in the current year. Therefore, if the district's application for state school money, report pursuant to Section 163.081, RSMo 1969, and calendar pursuant to Section 171.031, RSMo 1969, as filed with the State Board of Education all indicate that the district is qualified for state aid in the current year, the district will receive its share of state school money in the current year. In the following school year, the district's share of state school money will be reduced by the amount it received in the current year to which it was not entitled. However, should a school district amend any of these documents or otherwise officially notify the State Board of Education in the current year that the district is not qualified under Section 163.021, RSMo 1969, to receive state school money, the State Board of Education would then be obligated to adjust immediately the district's apportionment of school money.</p>
504-70	Dec 16	AIRPORTS. REVENUE BONDS. COOPERATIVE AGREEMENTS. CITIES, TOWNS & VILLAGES.	<p>The City of St. Louis may not issue and sell revenue bonds, and use the proceeds therefrom for the purpose of purchasing, constructing, extending or improving an airport to be jointly owned by the City of St. Louis and the State of Illinois. The City of St. Louis, by ordinance, may use general tax revenues for such purpose. The City of St. Louis may not contribute its general tax revenues to the construction and operation of an airport of which it is not a joint owner. The consent of the Congress of the United States, if required, has been given to the proposed airport to be jointly owned by the City of St. Louis and the State of Illinois.</p>

505-70	Oct 9	COUNTY BUILDINGS. COUNTIES. COUNTY COURT.	The circuit court of a county cannot require the county court to appropriate money for the repair of the county courthouse, or to order by mandamus or other action the county court to repair the courthouse unless the county court abused or arbitrarily exercised its discretion.
507-70	Sept 29		Opinion letter to the Honorable Fred W. Meyer
508-70	Oct 2		Opinion letter to the Honorable Arlie H. Meyer
511-70	Oct 6	DISABILITY BENEFITS. FIRE PROTECTION DISTRICTS.	The additional proviso respecting the payment of health, accident or disability benefits to salaried members of the organized fire department of a fire protection district in a first class county who shall become disabled due to injury or disease incurred while on duty or in the performance of their duties, must be submitted to the voters and approved by them even though the voters have previously approved pensions and death benefits.
512-70	Oct 1		Opinion letter to the Honorable Allen S. Parish
516-70	Oct 9	CONSTITUTIONAL LAW. SCHOOLS.	The amount of indebtedness which may be incurred by a school district is determined on the basis of a calendar year rather than a fiscal year.
519-70	Dec 9	MOTOR VEHICLES.	A commercial motor vehicle used by the owner or operator to deliver limestone to farms owned or leased by other persons more than twenty-five miles beyond the municipal area where the operation is based, is not a "local commercial vehicle" within the meaning of Section 301.010(12), RSMo 1969.
520-70	Nov 18		Opinion letter to the Honorable Robert Payne
522-70	Oct 26		Opinion letter to the Honorable William G. Johnson
523-70	Oct 8	BONDS. BAIL. SUPREME COURT RULES.	A bondsman or surety is disqualified from making further bonds when a forfeiture has been entered upon a recognizance to which he is a party, even though motions to set aside such forfeiture may be pending.
524-70	Oct 7	SCHOOLS. STATE BOARD OF EDUCATION. COMMISSIONER OF EDUCATION.	The plain and rational meaning of the word "administration" as used in Section 161.112, RSMo 1969, which sets forth the qualifications for the State Commissioner of Education, involves as an essential element the performance of executive duties. From the facts set forth in your telegram, the individual in question does not possess "breadth of experience in the administration of public education" as required by Section 161.112 and is, therefore, not qualified for appointment to the office of State Commissioner of Education.
525-70			

525-70	Oct 14		Opinion letter to the Honorable James E. Schaffner
528-70	Oct 8		Opinion letter to the Honorable Bob F. Griffin
530-70	Dec 10	ASSESSORS. COOPERATIVE AGREEMENTS.	1. The county assessor of Marion County, Missouri, may enter into a cooperative agreement with the City of Hannibal under such terms and conditions as may be approved by the county court, as provided under the provisions of Sections 70.210 to 70.230, RSMo to perform the duties of the City Assessor of Hannibal. 2. The County Assessor of Marion County has no authority to perform the duties of the City Assessor of Hannibal except as provided under Sections 70.210 to 70.230, RSMo. 3. Under such agreement the county assessor may use the facilities of his office and services of his deputies and clerks in performing the duties of the city assessor. 4. All compensation paid by the City of Hannibal for the use of such facility, and the services of the assessor, his deputies and clerks shall be paid to Marion County and deposited in the county treasury.
531-70			Withdrawn
532-70	Dec 15	TAXATION (INCOME). TAXATION (SALES AND USE).	(1) The Missouri Income Tax law cannot be amended after January 1, 1971, increasing tax rates or otherwise altering tax liability, making the change effective for the entire year 1971. (2) Missouri may impose a surtax on income similar to the surtax imposed by the federal government. (3) The General Assembly cannot impose an income tax computed solely on the basis of taxpayer's federal income tax liability. (4) The Missouri General Assembly cannot legally use the entire 1971 income as the basis for a surtax or as the basis for imposing a tax computed on a percentage of the federal tax where the law is passed after January 1, 1971. (5) Section 13 of Article I of the Missouri Constitution prohibits enactment of retrospective tax laws irrespective of whether the tax is imposed upon individuals or corporations. (6) The legislature can provide for referral of tax increase measures earmarking a part of the increase for support of public education to the electorate by referendum. (7) It is legal to impose a tax on sales of advertising.
538-70	Oct 29		Opinion letter to Mr. G. L. Donahoe
541-70	Nov 18		Opinion letter to the Honorable Robert S. Drake, Jr.
544-70	Dec 31		Opinion letter to the Honorable John C. Ryan
546-70	Nov 20	SCHOOLS. CONSTITUTIONAL LAW.	House Joint Resolution No. 1, Third Extraordinary Session Seventy-fifth General Assembly (Constitutional Amendment No. 4 on ballot November 3, 1970), which enacts a new Section 11(c) of Article X of the Constitution of Missouri, provides that if the board of

			education of a school district does not submit to the electorate a proposal for a higher tax rate for school purposes after the effective date of the amendment, the last tax rate approved in the district shall continue for the current tax year.
550-70	Dec 31		Opinion letter to the Honorable George E. Murray
558-70	Dec 9		Opinion letter to the Honorable Raymond L. Skaggs
559-70			Opinion letter to the Honorable Lawrence J. Lee
565-70	Dec 1		Opinion letter to the Honorable Thomas B. Burkemper
566-70	Nov 25	DENTISTS. CONSTITUTIONAL LAW.	The provision of Section 332.131, RSMo 1969, which requires that candidates for licenses as dentists in the State of Missouri be citizens of the United States is unconstitutional.
576-70	Dec 24		Opinion letter to Mr. William P. Wright
578-70	Dec 16	CONSTITUTIONAL LAW. JUNIOR COLLEGE DISTRICTS.	The buildings and facilities of junior college districts created pursuant to Section 178.770 through Section 178.890, RSMo 1969, are "state buildings and facilities" as that term is used in the perfected version of House Joint Resolution 1, Fourth Extraordinary Session, 75th General Assembly and, therefore, the junior college districts of Missouri would be eligible for funds from the Third State Building Fund to be created if the proposed constitutional amendment contained in House Joint Resolution 1 is approved by the voters.
583-70	Dec 30		Opinion letter to Mr. Howard L. McFadden
588-70	Dec 18	SECRETARY OF STATE. ELECTIONS. POLITICAL PARTIES. CANDIDATES.	The American Party is no longer an established political party for the purpose of nominating candidates for Governor or other statewide offices in the State of Missouri because the only candidate for state office received less than two percent of the vote at the 1970 General Election. Since the American Party is not now an established party for the entire state the Secretary of State should not accept declarations of candidacy for Governor or other statewide offices for such non existent party.
591-70	Dec 24		Opinion letter to the Honorable William S. Brandom
596-70			Withdrawn

CRIMINAL LAW:
ARREST:
POLICE:

A regularly employed police officer of a third class city retains the same powers to arrest while off duty which he possesses while on duty;

the liability of a police officer of a third class city for false arrest and other related torts depends upon the lawfulness of the arrest; the lawfulness of an arrest made by a police officer from a third class city does not depend upon whether the policeman was on or off duty; and a private citizen may only arrest for those misdemeanors which involve breaches of the peace, petit larceny committed in his presence, or pursuant to those powers granted him by virtue of Section 537.125, RSMo 1969, and Section 560.415, RSMo 1969.

November 20, 1970

OPINION NO. 3

Honorable John A. Grellner
State Representative
Fortieth District
State Capitol Building
Jefferson City, Missouri 65101



Dear Representative Grellner:

This official opinion is in response to two questions you submitted for this office's resolution. Those questions, together with our responses thereto, are as follows:

"1. Does a person who is regularly employed as a police officer of a 3rd class city, while off duty, still retain the power to arrest as he has while on duty? What is the result if the police officer, while off duty, is engaged in a purely private pursuit such as, employment for an employer completely outside the scope of his activities as a police officer?"

Within the context of your question, the "power to arrest" involves (1) the ability to make a valid arrest, i.e., one which will support a valid prosecution and conviction of the offender,

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and (2) the ability to arrest a probable offender without fear of liability for false imprisonment, false arrest, assault and battery, etc. These two aspects of the power to arrest will be considered by this opinion within the context of your question.

I. The power of a regularly employed police officer from a third class city to make valid arrests while off duty.

Obviously, whether a policeman is either on or off duty will be important only if his powers to arrest will be affected by this status. If an off duty policeman may be considered to be in the position of a private person insofar as his power to arrest is concerned, and if the power of a private person to make arrests is less than that of an on duty policeman, then the policeman's off duty status may affect the validity of certain arrests. This opinion, therefore, will first consider whether there are any differences between the power of an on duty policeman to make an arrest and the power of a private citizen to make an arrest. To facilitate an analysis of these powers, we have categorized the various offenses as being either (1) city ordinance violations, (2) felony violations, or (3) state misdemeanor violations.

Section 85.561(3), RSMo 1969, important with regard to the powers of policemen in third class cities, provides in relevant part as follows:

"3. Every member of the police department shall have power at all times to make or order an arrest with proper process for any offense against the laws of the city, . . . and shall also have power to make arrests without process in all cases in which any offense against the laws of the city shall be committed in his presence. . . ."
(Emphasis added.)

In our opinion, the phrases "at all times" and "any offense against the laws of the city" indicate a clear legislative intention to authorize city policemen, whether on or off duty, to make arrests for offenses committed in their presence against the laws of the city. Thus, if a third class city's off duty policeman observes the violation of a city ordinance inside that city's limits, the off duty policeman may make a valid arrest for that offense.

For the purpose of considering the validity of an arrest made by an off duty policeman for the commission of a felony, the assumption is necessarily made that a felony was actually committed by the person arrested. With that assumption, the case of State v.

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Keeny, 431 S.W.2d 95 (Mo. 1968), becomes relevant. In that case, a city policeman from a third class city was advised by the victim of a robbery as to the description of the robber's automobile and as to its general direction of travel from the scene of the robbery. He sighted a car fitting this description approximately ten miles outside the city limits, and succeeded in getting it to stop. Upon arresting the occupants and searching the automobile, evidence was produced which lead to the occupants' conviction for the robbery. In affirming this conviction, the Missouri Supreme Court held:

"This arrest was lawful and this being so, the ensuing search of the automobile as here described, was lawful, as incident thereto. The fact that policeman Grimes was outside his jurisdiction does not make the arrest unlawful under the circumstances before us. A private citizen could lawfully have proceeded as Grimes did. The facts are that there was a robbery; within a few minutes after it occurred, Grimes learned from a reliable source that the perpetrator was a man with a gun who left the scene in a particular style and color car, . . . Within 16 minutes from the time he was first called about the robbery he overtook such a car. . . . Under these circumstances, Grimes had reasonable grounds to believe that the men in the car were the ones who committed the robbery and could lawfully arrest them without warrant, . . ." (Id. at 97).

See also State v. Murray, 445 S.W.2d 296 (Mo. 1969), where an arrest similar to the one occurring in the Keeny case was upheld as valid even though made outside the city limits by a city police officer. Thus, it appears to be the law in Missouri that a police officer or a private citizen who has "reasonable grounds to believe" a felony has been committed by the person he seeks to arrest, may apprehend and arrest that person. Nor does there appear to be any difference in the amount of force available to a private person effecting a lawful arrest and that available to a policeman making the same arrest. State v. Parker, 199 S.W.2d 338 (Mo. 1947). Thus, again, a policeman's on or off duty status would not appear to affect the validity of an arrest made for the commission of a felony.

It is in the third area -- arrest for state misdemeanor violations -- that a policeman's on or off duty status may be important. The common law rule is that a private citizen may not arrest for a misdemeanor unless it constitutes a breach of the peace. 5 Am.Jur.

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2d "Arrests", Section 35, page 727. The case of State v. Parker, 378 S.W.2d 274 (Spr.Mo.App. 1964), recognizes this rule as being in effect in Missouri, but further states that a private citizen may arrest for a petit larceny committed in his presence. Id. at 282. Thus it may be said that as a general rule in Missouri, a private citizen may only arrest for state misdemeanor violations which constitute either a breach of the peace or a petit larceny. However, a police officer may arrest for any misdemeanor violation which occurs in his presence. State ex rel. Patterson v. Collins, 172 S.W.2d 284 (St.L.Mo.App. 1943). This difference in the arrest powers of a policeman and a private citizen forces us to consider the question of whether an off duty policeman is to be considered as having only those powers of arrest available to a private citizen.

As will be shown by the following discussion, it is our opinion that an individual who is a city policeman may not behave inconsistently with the nature of that office. In other words, employment as a policeman involves a service to the public of such a nature that they are under a special duty at all times to use their best efforts to apprehend criminals.

The nature of the office of policeman has been variously defined, but the below quotations are particularly appropriate to this opinion:

"We think the term 'policeman,' as that term is generally used and understood, means a person who is a member of an organized civil force for maintaining peace and order, preventing and detecting crime, and enforcing the law. A policeman of a city is a person who has been authorized and empowered by the city to perform duties which relate to its governmental function of maintaining peace and order. . . ." Tezeno v. Maryland Casualty Company, 166 So.2d 351, 356 (La.App. 1964).

"A public office has been defined as ' a public trust or agency created for the benefit of the people.' State ex rel. Nagle v. Sullivan, supra. A public officer is bound by a very high standard of conduct. A law enforcement official has a higher responsibility than mere strict compliance with the letter of the law. When the people delegate to an officer the right to enforce a standard of conduct on themselves,

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they may reasonably expect him to carry out his duties with a high degree of intelligence and devotion to the law which he is entrusted to enforce." State ex rel. Hollibaugh v. State Fish and Game Commission, 365 P.2d 942, 948 (Mont. 1961).

". . . The primary duty of a police officer is to preserve peace. He is an officer of the law whose duties require him to come in daily contact with crime and law enforcement. He is paid out of the public treasury to devote his time to his duties. . . ." State v. Butts, 159 S.W.2d 790, 793 (Mo. 1942).

The above quotations indicate that a police officer is a public official engaged in performing a governmental function, and may take no action or position inconsistent with this status. Obviously, an off duty policeman need not be as diligent or as active in his pursuit of criminal offenders as an on duty policeman. Nevertheless, if a policeman devotes part of his off duty hours to the apprehension of a criminal offender, it would be inconsistent with those publicly imposed obligations of a policeman discussed above for an off duty policeman to be simultaneously handicapped by a diminution of his arrest powers. In other words, if the state may require a policeman to behave consistently with the public trust imposed upon him because of the nature of his office twenty-four hours a day, then it follows that all the official powers which are normally available to an on duty police officer should likewise be available to the policeman twenty-four hours a day.

No case was found directly bearing on this issue. However, the issued involved in the case of Kick v. Merry, 23 Mo. 72 (1856), involved an issue very similar to the one at hand. In that case, a city policeman sought to claim a reward upon apprehending a criminal, contending that when he acted in effecting this arrest, he was doing so as a private citizen and not as a member of the police. In holding that the policeman was not entitled to the reward, the Supreme Court stated:

". . . [policemen] are required, to the best of their ability, to preserve order, peace and quiet throughout the city. . . . Under the circumstances, the officer has no right to insist that he acted as an individual in his private capacity. The case falls within the mischief of the rule of the common law

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which prohibits an officer from taking a reward as an inducement to do his duty. He received a stated salary for his services. The services rendered were within the duties of his office. All his energies had been devoted to the service of the city. . . ." (Id. at 75-76).

While the Kick case did not concern itself with the off duty -- on duty question, several other jurisdictions have cited the Kick case for the proposition that it is contrary to public policy for a peace officer, acting within the scope of his authority and line of duty, to receive a reward for an arrest, even though this arrest is made when the police officer is off duty. See, e.g., Oklahoma Ry. Co. v. Morris, 48 Okla. 8, 148 P. 1032 (1914); Hanmer v. Wells Fargo & Co. Express, 160 N.Y.Supp. 651 (1916); and Beck v. Sulser, 48 Okla. 187, 150 P. 107 (1915).

Finally, the case of People v. Derby, 2 Cal.Rptr. 401 (Cal. App. 1960), is important. In that case, the defendant was convicted of resisting a public officer in the discharge of the duties of his office, and he appealed contending that the police officers, who made the arrest immediately after ending their tour of duty for that day, were not "engaged in performing a duty of their office" at the time of the arrest. The California Court of Appeals noted that there was sufficient evidence in the record to sustain a finding that the officers were still on duty when the arrest was made, but noted further that:

" . . . it is clear that a breach of the peace was committed in the officers' presence, and they were not required to ignore this conduct on the part of the appellant whether or not their particular hours of duty had been completed. (Emphasis added). (Id. at 404).

Thus, the California Court of Appeals noted that public peace officers are considered to be "on duty" twenty-fours a day.

In our opinion, the above discussed authority indicates a judicial recognition of the fact that employment as a police officer cannot be considered as merely another form of gainful employment. The position of policemen is not analogous to the ordinary employer-employee relationship, where the employee is authorized to perform his employment only during working hours. Of primary importance is the fact that in arresting criminals, the policeman acts in the public interest, and not selfishly. Thus, although an ar-

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rest of a criminal prevents the theft of an individual's chattel, not only is that individual benefited, but the state as a whole benefits as well. Therefore, both the individual and the state benefit by a policeman's zealous devotion to his duty.

II. The liability of an off duty police officer for unlawful arrest and other related torts.

If a good faith arrest is made of an innocent individual, the extent to which the person making the arrest will be liable for false imprisonment, or other related torts, will greatly depend upon whether he is a policeman or a private citizen. In the case of State v. Nolan, 192 S.W.2d 1016 (Mo. 1946), the Supreme Court of Missouri noted that a police officer may lawfully arrest an individual that the police officer has reasonable grounds to suspect that he has committed a felony, even though no felony in fact was committed, but that a private citizen may justify the arrest only if a felony was in fact committed. Id. at 1019.

"... It is the right and privilege of any citizen, knowing that one has committed or is in the act of committing a crime, to arrest the offender or cause him to be arrested without waiting for a warrant; but in doing so the unofficial citizen takes this risk, to wit: If it should turn out that the man whom he has arrested was not guilty of the crime, the citizen causing the arrest is liable in a civil action for whatever damages the arrested man sustained in consequence of his arrest and imprisonment. In such case it is no answer to the plaintiff's demand for damages for the defendant to say: 'I had reasonable cause to believe the plaintiff was guilty. I acted without malice. I took the advice of counsel learned in law.' The only plea of justification or excuse is that plaintiff was guilty of the crime for which he was arrested. ..." Pandjiris v. Hartman, 94 S.W. 270, 272 (Mo. 1906).

The above quote should be compared with the following statement of the case of Winegar v. Chicago, B. & Q. R. Co., 163 S.W.2d 357, 365 (K.C.Mo.App. 1942):

"The police officers had a lawful right to arrest plaintiff when there was reasonable grounds to believe that he had committed an

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offense, even though he was not convicted, and the officers would not be liable in damages. This immunity, however, in behalf of the officers does not absolve an individual who furnishes information that an offense has been committed and encourages and requests officers to make an arrest of an innocent party . . . If party is arrested at the direction of an unofficial citizen, the only ground of justification is that the party arrested is guilty. . . ." (Citations omitted).

Thus, the following generalizations may be made: (1) a policeman may arrest an innocent individual without fear of false arrest liability where he has reasonable grounds to suspect that a felony has been committed and reasonable grounds to suspect that the individual he arrests committed the felony; (2) a private citizen may escape false arrest liability only if he is able to show the person arrested was guilty of the crime for which he was arrested and reasonable grounds to suspect the person he arrested. The gist of an action for false arrest and false imprisonment is a wrongful arrest or an unlawful arrest. Gerald v. Caterers, Inc., 382 S.W.2d 740 (K.C.Mo.App. 1964). Thus, the final important generalization becomes: (3) false arrest liability depends upon whether the arrest was lawful.

You inquire as to the effect the foregoing statements of law have upon an off duty policeman assuming employment completely unrelated to his job as a policeman. Naturally, this office is unable to make predictions as to the probable outcome of potential litigation absent a specific fact situation. Nevertheless, the following discussion will highlight the various problems in this area.

As was discussed earlier, it is our opinion that an off duty police officer retains the same powers to arrest as those possessed by an on duty police officer. Thus, if an off duty police officer makes an arrest which would be valid and lawful if made by an on duty police officer, then no liability should result.

The case of Nelson v. R. H. Macey & Co., 434 S.W.2d 767 (K.C.Mo.App. 1968), is important. That case, an off duty police officer was employed as a store detective by a department store. This off duty policeman made what the jury found to be an unlawful arrest for shoplifting, and turned the suspect over to store authorities. The suspect-plaintiff sued the department store for false imprisonment, and his recovery against the corporation was affirmed on appeal. Significant was the court's determination that

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the police officer's status as a police officer was irrelevant insofar as the employer's liability was concerned:

" . . . If the jury found, as they did, that Henthorn (the police officer) was acting within the scope of his employment, then he could not be acting in a dual capacity, or, to put it another way, if Henthorn was acting within the scope of his employment, then the fact that he was also a police officer became unimportant and no effect on the defendant's liability." (Id. at 776-777).

Thus, an employer may not shield himself from liability merely because his employee is an off duty police officer.

In our opinion, the Nelson v. R. H. Macey & Co. case is not authority for the proposition that an off duty police officer may act in such a way as to expose himself to personal liability for actions which would be lawful if performed while he was on duty. Rather, the case involves an arrest which would have been unlawful even if made by an on duty police officer. It is of course possible, however, that an off duty police officer could behave in such a way as to negate any presumption that he was acting for the benefit of the state or pursuant to his employment as a police officer, and thus, his personal liability might result. Again, we refuse to express an opinion as to the probability or validity of such a result.

Your second question was as follows:

"2. Does a private citizen have the legal right to arrest for a misdemeanor committed within his presence, but not amounting to a breach of the peace?"

As a general rule, a private citizen may arrest for a misdemeanor violation only if it involves a breach of the peace. 5 Am.Jur.2d "Arrests", Section 35, page 727. The case of State v. Parker, 378 S.W.2d 274 (Spr.Mo.App. 1964), also states that a private citizen may arrest for a petit larceny which is committed in his presence. Id. at 282. This statement, which is dicta in the Parker case, is the only expression of this right found by us in any Missouri case. While this absence of similar authority tends to cast doubt on the existence of such a right, the statement nevertheless exists in a reported Missouri decision, and is, therefore, entitled to the weight normally accorded similar statements of law.

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At any rate, Missouri statutes have substantially altered this area of the law in those areas most likely to create problems. Section 537.125, RSMo 1969, provides in relevant part as follows:

"2. Any merchant, his agent or employee, who has reasonable grounds or probable cause to believe that a person has committed or is committing a wrongful taking of merchandise or money from a mercantile establishment, may detain such person in a reasonable manner and for a reasonable length of time for the purpose of investigating whether there has been a wrongful taking of such merchandise or money. Any such reasonable detention shall not constitute an unlawful arrest or detention, nor shall it render the merchant, his agent or employee, criminally or civilly liable to the person so detained.

"3. . . . the finding of such unpurchased merchandise concealed upon the person or among the belongings of such person shall be evidence of reasonable grounds and probable cause for the detention . . . by a merchant, his agent or employee, in order that recovery of such merchandise may be effected, and any such reasonable detention shall not be deemed to be unlawful, nor render such merchant, his agent or employee criminally or civilly liable."
(Emphasis added).

Thus, here, if the private citizen is either a merchant or the merchant's agent or employee, he may arrest for a misdemeanor pursuant to the terms of Section 537.125, RSMo 1969.

Also important is Section 560.415, RSMo 1969, which sets out particular instances where any person found in the actual perpetration of certain offenses (which generally consist of the malicious destruction of certain property) may be arrested by the owner or person in possession of the premises or property upon which the offense is committed:

". . . without warrant, and taken before the nearest magistrate, to be dealt with according to law." Section 560.415, supra.

Other than the Parker case and the above two statutory exceptions to the general common law rule, no expansion of the right of

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the private citizen to arrest for the commission of a misdemeanor was found. It is our opinion that a private citizen's right to arrest for the commission of a misdemeanor is limited to the above common law rule and the three noted exceptions.

CONCLUSION

It is, therefore, our opinion that a regularly employed police officer of a third class city retains the same powers to arrest while off duty which he possesses while on duty; that the liability of a police officer of a third class city for false arrest and other related torts depends upon the lawfulness of the arrest; that the lawfulness of an arrest made by a police officer from a third class city does not depend upon whether the policeman was on or off duty; and that a private citizen may only arrest for those misdemeanors which involve breaches of the peace, petit larceny committed in his presence, or pursuant to those powers granted him by virtue of Section 537.125, RSMo 1969, and Section 560.415, RSMo 1969.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Craig A. Van Matre.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

COUNTY COLLECTORS:
TOWNSHIP COLLECTORS:
SOCIAL SECURITY:
LIBRARIES:
COUNTY LIBRARIES:

1. County and/or township collectors may charge commissions authorized to them against funds collected for library purposes. 2. The County Library Board is not required to make payments from library funds of the

"employer's share" of social security tax payments for the benefit of the county or township collectors who have collected library taxes for the reason that such payments do not constitute taxable wages paid by an employer to an employee within the meaning of the Social Security Act.

OPINION NO. 4

June 8, 1970

Honorable Charles O'Halloran
State Librarian
Missouri State Library
308 East High Street
Jefferson City, Missouri 65101



Dear Mr. O'Halloran:

This official opinion is issued in response to your request for a ruling regarding the following matters:

1. May county and/or township collectors charge commissions authorized to them against funds collected for library purposes?
2. Can the County Library Board be required to make payments from library funds of the "employer's share" of social security payments for the benefit of the county or township collector who has collected the library taxes?
3. Is there anything in the law providing for taxation for either city or county library districts which declares these taxes to be dedicated to the degree that they cannot be used except for purposes directly related to the library's internal programs?

With respect to the first question raised in your letter, it is our opinion that county and township collectors may deduct from library tax moneys collected by them the amount of fees authorized by statute. This authority is specifically granted to county collectors in Section 52.260, RSMo 1959, where it is stated that the county collector shall collect and retain certain commissions for collecting all state, county, bridge, road, school and all other local taxes. The commissions are based on a sliding scale depending upon the amount of the tax levy and the amount collected and the commissions are to be deducted and retained by the collector out of the amounts collected. (Section 52.260, 139.430 (4), RSMo.)

Honorable Charles O'Halloran

Likewise, Section 139.430, RSMo 1959, in relation to township collectors, states that the township collector shall receive a commission based upon certain percentages of all moneys collected by him.

The system for collecting library taxes is the same as that provided for collection of other property taxes by the political sub-divisions of the state. Chapter 137 of the Revised Statutes of Missouri, 1959, sets forth detailed procedures for levy and assessment of taxes generally and the delivery of the tax books to the collector. Chapter 139 of the Revised Statutes sets forth detailed procedures for collection of taxes. These assessment and collection procedures relate to library taxes as well as state, county, bridge, road, school and other taxes. There is no authority for handling the collection of library taxes and the payment of commissions for such collection by county and township collectors in a manner different from school taxes or other taxes of a local character.

The second question relates to the expenditure of library funds for payment of the employer's share of social security taxes on fees or commissions received by county or township collectors in connection with library taxes. This office has rendered a recent opinion which appears to be determinative of this question. Attorney General Opinion No. 65-Vaughn-1970. In the opinion it was stated:

"The same rule appears to be applicable insofar as the relationship between the township collector and the county is concerned. In other words, the township collector is an officer of the township but not of the county or the state, and the county clerk and the county assessor are officers of the county but not of the state or township. * * * Accordingly, it must be concluded that the county collectors and county assessors are employees of the county, and the township collectors are employees of the township in each instance. They are not employees of any other political entity. It follows that the county is the employer of the county clerk and the county assessor and the township is the employer of the township collector for the purposes of the Social Security Act, and the reporting of fees or wages required thereby should be made on this basis. *** In the matter under consideration the fees received from collecting school taxes are not paid by an employer to an

Honorable Charles O'Halloran

employee for services performed for the employer. The township collector is not an employee of the school district and therefore the fees do not constitute wages subject to the Act."

An opinion rendered by this office October 27, 1961, issued to Charles D. Trigg, contains the following language:

"While it is true that township collectors collect taxes for the county and state as well as the township itself (and also must account to the county court, Section 139.420), such fact does not make the collector a county officer anymore than it makes him an officer of the school district by reason of collecting school taxes."

In the present matter it is our view that the county or township collectors are not employees of the library districts and therefore the fees deducted from library tax funds do not constitute wages paid by the library districts upon which they must pay the employers share of Social Security Taxes.

As to the third question raised in your letter, it is assumed this relates to use of library funds to pay collectors' commissions which has been discussed hereinbefore. As there indicated the law clearly provides for such expenditures.

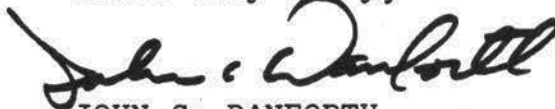
CONCLUSION

Therefore, it is the opinion of this office that:

1. County and/or township collectors may charge commissions authorized to them against funds collected for library purposes.
2. The County Library Board is not required to make payments from library funds of the "employer's share" of social security tax payments for the benefit of the county or township collectors who have collected library taxes for the reason that such payments do not constitute taxable wages paid by an employer to an employee within the meaning of the Social Security Act.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John E. Park.

Yours very truly,



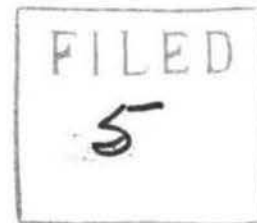
JOHN C. DANFORTH
Attorney General

(Answer by Letter) Burns

January 12, 1970

OPINION LETTER NO. 5

Honorable William H. Wessel
Prosecuting Attorney
Gasconade County
303 Schiller Street
Hermann, Missouri 65041



Dear Mr. Wessel:

This is in answer to your request as to the legality of the leasing of certain tower facilities belonging to Gasconade County to a private citizen. You state that the tower is being used presently by the sheriff for radio transmission purposes.

We are enclosing Opinion No. 92, rendered July 28, 1961, to Harold L. Volkmer, which we believe answers the question contained in your request.

Such opinion holds that county property may be leased for short terms to individuals when the county has no immediate need of the facilities for county purposes. Such holding is based on the fact that the temporary leasing or renting of the county property must be consistent with the public use the county has or will have for such property. It follows, therefore, that if the lease can be made in this case without interfering with the public use of the county property by the county, the lease would be authorized. On the other hand, if the lease in any way interfered with the public use of the property by the county, there would be no authority for the county to enter into such a lease.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosure

CIVIL DEFENSE:

When the citizens of a county are threatened by a disaster, the County Court has the authority to activate the county's civil defense personnel without requesting authority from the governor; said persons so activated have all rights, duties, and responsibilities granted them under Chapter 44 RSMo Supp. 1967 and by the rules and regulations thereunder.

OPINION NO. 6

May 13, 1970

Honorable G. William Weier
Prosecuting Attorney
Jefferson County Court House
P. O. Box 246
Hillsboro, Missouri 63050



Dear Mr. Weier:

This is in response to your opinion request dated November 13, 1969, which stated the following questions:

"My request to you is whether the Civil Defense people should participate in any assistance to the Sheriff's Department in case of such a disaster without the request of the Governor and at the request of the County Court and if they do so without the request of the Governor whether they would have any powers above those granted to a normal citizen and further whether they would incur the same liabilities as an ordinary citizen without any protection of the color of any office."

The first part of your question is whether the county court as a result of a county disaster in Jefferson County, can activate the county civil defense unit without a specific authorization from the Governor.

Section 44.010 RSMo Supp. 1967, defines Political Subdivision

Honorable G. William Weier

as ". . . any county or city, town or village, or any fire district created by law; . . ." and executive officer of any political subdivision as meaning "the county court or county supervisor or the mayor or other manager of the executive affairs of any city, town, village or fire protection district; . . . " It is clear that Jefferson County is a political subdivision within the meaning of Chapter 44 and that the county court is a governing body, i.e., executive officer recognized by Chapter 44.

Section 44.080, RSMo Supp. 1967 provides:

"1. Each political subdivision of this state shall establish a local organization for disaster planning in accordance with the state survival plan and program. The executive officer of the political subdivision shall appoint a coordinator who shall have direct responsibility for the organization, administration and operation of the local disaster planning for civil defense, subject to the direction and control of the executive officer or governing body. Each local organization for disaster planning shall be responsible for the performance of civil defense functions within the territorial limits of its political subdivision, and may conduct these functions outside of the territorial limits as may be required pursuant to the provisions of this law.

"2. In carrying out the provisions of this law, each political subdivision may:

"(1) Appropriate and expend funds, make contracts, obtain and distribute equipment, materials, and supplies for civil defense purposes, provide for the health and safety of persons, including emergency assistance to victims of any enemy attack; the safety of property, and direct and coordinate the development of disaster plans and programs in accordance with the policies and plans of the federal and state disaster and emergency planning;

"(2) Appoint, provide, or remove rescue

Honorable G. William Weier

teams, auxiliary fire and police personnel and other emergency operations teams, units or personnel who may serve without compensation;

"(3) In the event of enemy attack, waive the provisions of statutes requiring advertisement for bids for the performance of public work or entering into contracts."

The legislature intends that a local governmental entity "be responsible for the performance of civil defense functions within the territorial limits of its political subdivision."

Section 44.112, RSMo Supp. 1967, provides:

"It shall be the duty of every organization established pursuant to sections 44.010 to 44.130 and of the officers thereof to execute and enforce such orders, rules and regulations as may be made by the governor or adjutant general under authority of sections 44.010 to 44.130. Each organization shall have available for inspection at its office all orders, rules and regulations made by the governor, or under his authority."

The rules and regulations promulgated pursuant to this section are known as the "Missouri Disaster Operations Plan". The following rules are relevant to your question; subsection V (A) (1) (b) on page 7 states:

"During an emergency, the governing authority of each political subdivision will retain the responsibility for direction and control of its own governmental operations, personnel, resources, facilities and its own disaster units or organizations."

Subsection V (A) (1) (g) (1) on page 9 states:

"The elected and/or appointed public officials of political entities below the State level have the statutory responsibilities to provide for the health, safety, and welfare of the populace encompassed by the boundaries of their political subdivision. It is mandatory that these

Honorable G. William Weier

public officials recognize these inherent responsibilities and take appropriate action as required."

Subsection V (A) (3) (e) (1) on page 11 states:

"Upon notification of an impending natural disaster, chief executives of political subdivisions should take steps to implement their disaster plans to provide for the protection of life and property within its jurisdiction to the full extent of its capabilities."

It seems clear from a reading of Section 44.080, RSMo Supp. 1967, and the above quoted rules and regulations that when the citizens of the county are threatened by a disaster that the County Court has the authority to activate its disaster plan and utilize its civil defense personnel.

Since the political subdivisions executive officer has the right to activate civil defense personnel, said persons so activated have all rights, duties and responsibilities granted to them under Chapter 44 RSMo Supp. 1967 and the rules and regulations promulgated thereunder.

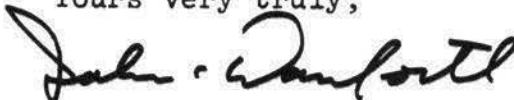
The final part of your question is whether civil defense personnel so activated would incur the same liabilities as an ordinary citizen without any protection of the color of any office. This question was answered by Attorney General Opinion No. 58, issued November 14, 1953 and I am enclosing a copy of said opinion.

CONCLUSION

When the citizens of a county are threatened by a disaster, the County Court has the authority to activate the county's civil defense personnel without requesting authority from the governor; said person so activated have all rights, duties, and responsibilities granted them under Chapter 44 RSMo Supp. 1967 and by the rules and regulations thereunder.

The foregoing opinion, which I hereby approve was prepared by my Assistant, Alfred C. Sikes.

Yours very truly,



JOHN C. DANFORTH
Attorney General

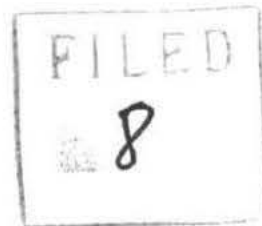
Enclosure: Op. No. 58
11-14-53, McDaniel

Answer by letter-Wieler

January 13, 1970

OPINION LETTER NO. 8

Honorable R. M. Becker
Prosecuting Attorney
Texas County Court House
Houston, Missouri 65483



Dear Mr. Becker:

This is in response to your request for an opinion from this office concerning the question whether the city or the county is liable for the medical care of a city prisoner who becomes ill or is injured while being held in the county jail.

A city prisoner may be held in the county jail under the provisions of Section 98.010, RSMo 1959. This section also provides:

" . . . Such city shall pay the board of such prisoner at the same rate as may now or hereafter be allowed by law to such sheriff for the keeping of other prisoners in his custody."
(Emphasis added)

Section 221.120, RSMo 1959, provides:

"In case any prisoner confined in the jail be sick, and, in the judgment of the jailer, needs a physician or medicine, said jailer shall procure the necessary medicine or medical attention, the costs of which shall be taxed and paid as other costs in criminal cases; or the county court may, in their discretion, employ a physician by the year, to attend said prisoners, and make such reasonable charge for his service and medicine, when required, to be taxed and collected as aforesaid."

Honorable R. M. Becker

There are no statutory provisions for the payment of medical expenses of one incarcerated in county jail. Generally if convicted the prisoner himself is responsible for the cost of his imprisonment. Section 221.070, RSMo 1959. These expenses are not costs of prosecution and therefore cannot be taxed against either the state or the county as costs. See Attorney General Opinion No. 39, issued to Mr. Lehen, March 14, 1967; Attorney General Opinion No. 31, issued to Mr. Hess, January 26, 1965 (copies attached).

However, the county court has the authority to provide for the payment of medical expenses incurred by indigent county jail prisoners. See Attorney General Opinion No. 133, issued to Richard J. Blanck, May 2, 1968 (copy attached).

In addition, the city can assume responsibility for the medical expenses of the indigent prisoner under authority of the statutes empowering it to provide for health and welfare. "As a municipal purpose, poor relief is recognized by our Legislature in the creation of social welfare boards and in express grants of authority to all of our cities to care for the poor. . . ." Jennings v. City of St. Louis, 58 S.W.2d 979, 982 (Mo. en banc 1933).

Therefore, it is our opinion that neither the city nor the county can be held responsible for medical expenses incurred by a city prisoner in a county jail, although both the city and the county can assume responsibility under existing health and welfare programs.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 39
3-14-67, Lehen

Op. No. 31
1-26-65, Hess

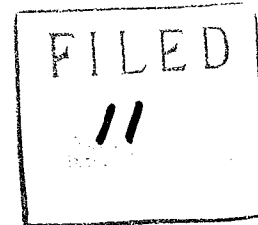
Op. No. 133
5-2-68, Blanck

PUBLIC RECORDS:
STATE RECORDS:

The authority of the Director of the State Records Commission under the State Records Law in microfilming records is limited to microfilming records which are to be stored or preserved and it does not apply to microfilming records used currently by state agencies.

OPINION NO. 11

January 12, 1970



Mr. James C. Kirkpatrick
Secretary of State
State of Missouri
Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Kirkpatrick:

This is in response to your request for an opinion from this office as follows:

"The state records act of 1965 gives to the Director of the Records Management and Archives Services, in this department, the authority to evaluate economies of microfilming projects and to operate microfilming services for agencies. 'Agencies' are defined in the act as any 'department, office, commission, board or other unit.'

"We offered central microfilming facilities to the Highway Department last August, but the department is now proceeding to purchase and install its own complete microfilming equipment.

"Respectfully request your official opinion on this matter. Does the state records act apply to the Highway Department."

Honorable James C. Kirkpatrick

Your request requires an interpretation of the State Records Law, Section 109.200 to 109.310 RSMo Supp. 1967. The cardinal rule in construing statutes is to ascertain the intention of the legislature from the ordinary meaning of the words used considering the whole act and its legislative history and seek to promote the purposes and objects of the statute and avoid any strained or absurd meaning. *St. Louis Southwestern Ry. Co. v. State Tax Com'n*, 319 S.W.2d 559. In arriving at the intention of the legislature, the title of the act is essentially a part of the act and is itself an active expression of general scope of the bill, and therefore, it may be looked to as an aid in arriving at the intention of the legislature. *Hurley v. Eidson*, 258 S.W.2d 607.

State Records Law was enacted by the Seventy-Third General Assembly by House Bill 294, Laws of Mo. 1965 page 233. The title of the act is as follows:

"AN ACT relating to state records, their definition, establishing a records management and archival service for their efficient and economical management and preservation; creating a state records commission to facilitate records evaluation and timely disposition; and providing for a continuing records and paperwork management program, and repealing inconsistent provisions, with an emergency clause."

Section 109.220, RSMo Supp. 1967, provides for the Secretary of State to establish and administer a "records management and archival service" for the efficient and economical application of management methods for the creation, utilization, maintenance, retention, preservation and disposal of official records with an annual report to the legislature and governor with recommendations for improvements and additional economies in the management of state government. It further authorizes the Secretary of State to appoint a director who is qualified in records management and archives practices and techniques.

Section 109.230, RSMo Supp. 1967, provides:

"The director shall, with due regard for the functions of the agencies concerned, and subject to the approval of the secretary of state:

- (1) Establish standards, procedures, and

Honorable James C. Kirkpatrick

techniques for effective management of records;

(2) Make continuing surveys of paperwork operations and recommend improvements in current records management practices including the use of space, equipment and supplies employed in creating, maintaining, storing and servicing records;

(3) With approval of the state records commission, establish standards for the preparation of schedules which provide for the retention of state records of continuing value and for the prompt and orderly disposal of state records no longer possessing sufficient administrative, legal, historical or fiscal value to warrant their further keeping;

(4) Publish lists of records authorized for disposal or retention;

(5) Supervise the state records center and archives;

(6) Establish standards and formulate procedures for the transfer, safeguarding and servicing of records;

(7) Evaluate economies of microfilming projects and operate microfilming services for agencies;

(8) Obtain reports from agencies as required for the administration of the program; and

(9) Serve as secretary to the state records commission."

Section 109.240, RSMo Supp. 1967, requires each agency to establish and maintain a continuing program for economical and efficient management and to make and master records sufficient to protect the legal and financial rights of the state. It further requires each agency to submit to the Chairman of the State Records Commission a schedule proposing the length of time each state record should be retained for administrative, legal, historic or fiscal

Honorable James C. Kirkpatrick

purposes and a list of state records that are not needed in transacting current business and do not warrant further keeping.

Section 109.260, RSMo Supp. 1967, provides that no record should be destroyed or otherwise disposed of by a state agency unless the Commission first determines it has no further administrative, legal, research or historic value.

Section 109.280 Mo. Supp. provides:

"Nothing in sections 109.200 to 109.310 shall be construed to divest agency heads of the authority to determine the nature and form of the records required in the administration of their several departments, or to compel the removal of records deemed necessary by them in the performance of their statutory duties. Any records made confidential by law shall be so treated in the state records center and archives."

The above statute states that the state records law does not take authority away from the agency head to determine the nature and form of the records required by the agency as necessary in the administration of their department.

Applying the cardinal rule of statutes construction in arriving at the intention of the legislature from the words used and considering the act as a whole, we believe it was intended that these statutes should be applied to the storage of state records that are no longer actually used and which should be preserved for future use or historical value. We believe the primary purpose of the act as expressed in the title was to establish an efficient and economical method for the disposal or preservation of state records giving the director, with the approval of the state records commission, authority to determine the records which have no further administrative, legal, fiscal, research, or historic value and which should be destroyed, from those which are to be preserved for future use. It is our view that the Commission has authority to determine whether the original records are to be stored or microfilmed for preservation by the director, subject to the approval of the Secretary of State. We believe the legislature intended to give the director, with the approval of the Commission and Secretary of State, authority to assist and suggest procedures for record keeping and other procedures in office management but this authority is only advisory and the ultimate determination of the records that are to be main-

Honorable James C. Kirkpatrick

tained for current use, and the manner of keeping those records is with the agency. The provision in the statute authorizing the director, with the approval of the Secretary of State, to evaluate economies of microfilming services for agencies applies only to the storage or microfilming of records for storage and it has no application to microfilming of records by agencies for current use in the performance of its duties.

CONCLUSION

It is the opinion of this office that the authority of the Director of the State Records Commission under the State Records Law in microfilming records is limited to microfilming records which are to be stored or preserved, and it does not apply to microfilming records used currently by state agencies.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

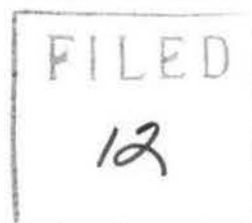
CITIES, TOWNS AND VILLAGES:
RUBBISH:

The City of Brentwood has the authority under Sections 71.680 and 71.690, RSMo, to charge and collect an annual fee for the collection of rubbish, and as a matter of convenience to bill for the fee on the annual real estate bill, so long as it is not considered and treated as a real estate tax.

March 6, 1970

OPINION NO. 12

Honorable Corley Thompson, Jr.
Representative, 41st District
35 Rosemont
Webster Groves, Missouri 63119



Dear Mr. Thompson:

This is in reply to your request for an official opinion of this office concerning the question whether the City of Brentwood can legally impose an annual charge on property owners for rubbish collection service and further whether such fee can be collected on the annual bill for real estate taxes.

The ordinance in question reads in part as follows:

"SECTION 1. For the purpose of defraying the expenses of the collection, removal and disposal of garbage and rubbish as provided in Ordinance No. 1859, and the agreement authorized thereunder, charges per year to property owners are authorized and directed to be collected from the owners of the premises and others covered by the terms of said Ordinance No. 1859, and the agreement authorized thereunder, by incorporating the amount due for garbage and rubbish collection, removal and disposal service into the real estate tax bill of all such property owners. It shall be the responsibility of the City Clerk-City Administrator, or any other person in charge of the enforcement of this ordinance and Ordinance No. 1859, to be responsible for the collection of such bills. All bills for garbage and rubbish collection, removal and disposal services shall be paid in like manner as payment of real estate taxes of this City. Said charges for garbage and rubbish collection, removal and disposal services shall be identified on said tax bills as a separate charge and shall be apart from and not to be considered as a part of

Honorable Corley Thompson, Jr.

the tax levies authorized by R.S.Mo. Sec. 94.250 and Sec. 94.260."

The accumulation of garbage, trash, litter, and rubbish for a period of four days is declared by Section 3 to be a public nuisance, and a clear danger to public health.

Section 71.680, RSMo 1959, gives authority to certain size cities to protect the public health with rubbish collection and reads in part as follows:

"In addition to their other powers for the protection of the public health, each city of the second, third, or fourth class of this state, and each city having less than ten thousand inhabitants which has a special charter, may provide for the gathering, handling and disposition of garbage, trash, cinders, refuse matter and municipal waste accumulating in such cities either by itself, or by contract with others, and may pay for the same out of general revenues or by collection of charges for such service, and may do such other and further acts as are expedient for the protection and preservation of the public health, as the public health may be affected by the accumulation of trash, cinders, garbage, refuse matter and municipal waste. * * * "

Section 71.690, RSMo 1959, reads as follows:

"Such cities may pass all ordinances necessary for the carrying into effect of the powers granted in section 71.680."

We note that the City of Brentwood is a fourth class city and therefore comes under the above provisions. It is apparent that the ordinance in question was passed pursuant to the authority of Section 71.680 and Section 71.690.

It is also apparent that the purpose of the ordinance and the statutes are to provide for the collection of garbage and trash as a governmental function coming under the police power of a municipality to protect the health of the public. See *Hog Ranch v. Plagmann, Mo.*, 220 S.W.1; and *Harper v. Richardson, Mo.*, 297 S.W.141.

Under the laws in question and the cases cited the exercise of this function of collecting trash and garbage can be made exclusive by the city and it can be contracted for. Furthermore, a charge can be made for this service for the benefit of all, and the service is not solely related to the cost of an individual collection. Therefore, it is not necessary that an individual use the service before he can be required to pay. The benefit is not only from the collec-

Honorable Corley Thompson, Jr.

tion of an individual's trash but in the general protection of the health of the individual and the community through general enforcement of sanitary measures.

Therefore, it is our opinion that the ordinance and the statutes cited are not tax measures which conflict with or would be subject to Article X, Section 11(c), Constitution of Missouri, or Section 94.260, RSMo 1959. Rather, the ordinance and statutes comply with Article X, Section 11(f), Constitution of Missouri, which permits the legislature to authorize cities to impose taxes that are not ad valorem taxes. This has been done with the enactment of the ordinance and Sections 71.680 and 71.690, and, as stated, they are a proper exercise of the police power of the state and the city.

For authority in other jurisdictions see:

City of Hobbs v. Chessport, Ltd., N.M., 417 P.2d 210 (1966);
City of Glendale v. Trondsen, Cal., 308 P.2d 1;
Silver v. City of Los Angeles, 31 Cal.Rptr. 545 (1963);
Mayor and Aldermen of City of Milledgeville v. Green, Ga.,
145 S.E.2d 507 (1965);
Cassidy v. City of Bowling Green, Ky., 368 S.W.2d 318 (1963);
City of Lake Charles v. Wallace, La., 170 So.2d 654.

We see no prohibition, however, to putting this collection fee on the annual bill for real estate taxes as a matter of convenience in billing and collecting the fee so long as it is not considered and treated the same as a real estate tax.

CONCLUSION

It is the opinion of this office that the City of Brentwood has the authority under Sections 71.680 and 71.690, RSMo, to charge and collect an annual fee for the collection of rubbish, and as a matter of convenience to bill for the fee on the annual real estate bill, so long as it is not considered and treated as a real estate tax.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Walter W. Nowotny, Jr.

Very truly yours,



JOHN C. DANFORTH
Attorney General

COUNTY COURTS:

The Boone County Court has no authority to convey by gift to the Boone County Agricultural and Mechanical Society real property belonging to the county.

OPINION NO. 13

January 19, 1970

Honorable A. Basey Vanlandingham
State Senator, District 19
12 Glenview Plaza, Box 711
Columbia, Missouri 65201



Dear Senator Vanlandingham:

This official opinion is in response to your request for an opinion in which you ask whether the Boone County Court can convey real property owned by the county as a gift to the Boone County Agricultural and Mechanical Society.

Section 262.290, RSMo 1959, authorizes the incorporation of nonprofit county agricultural and mechanical societies for the purpose of promoting improvements in agriculture, manufacture and the raising of stock. To effectuate this purpose, the statute further permits such county societies and associations to purchase, hold, lease, rent and receive quantities of land not exceeding 100 acres.

Thus, it is clear that Boone County Agricultural and Mechanical Society may accept gifts of real property to effectuate the purposes for which it was incorporated. The real question then is whether the county court may make a gift to such society of county real property.

We are enclosing Opinion No. 42 rendered August 19, 1948, to Marvin C. Hopper, which holds that a county court cannot give away county property unless authority to do so is given by a statute.

The only statute which could be found that sanctions donations by the county courts to county agricultural and mechanical societies and fair associations is Section 262.350, RSMo, which provides in pertinent part:

"The county court of any county may, if it be deemed expedient, appropriate out of the county treasury for the benefit of any society regularly organized as a . . . county fair, . . . or any other organization or incorporated society having for its object the holding of

Honorable A. Basey Vanlandingham

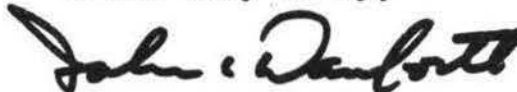
county fairs or the advancement of agriculture or its allied industries, a sum not exceeding three hundred dollars in any one year. The money so appropriated shall be drawn by the treasurer of the society on proper warrant; provided said money shall be awarded by the board of directors or other proper officials [of the association or society] in premiums or expended by them in the purchase of premiums, . . . provided further, that in all counties in this state of the second class the county court of such county may, if it is deemed expedient, appropriate out of the surplus remaining in the county treasury, for the benefit of any such society, a sum not exceeding ten thousand dollars to be used as in this section above set out, or in any other manner that said board of directors may deem best."

This statute contemplates donations only in the form of money to county agricultural and mechanical societies. Had the legislature wished to permit the county courts to donate real property to such societies, this statute would have been the one to reflect such intention.

CONCLUSION

The Boone County Court has no authority to convey by gift to the Boone County Agricultural and Mechanical Society real property belonging to the county.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 42
8-19-48, Hopper

Answer by Letter (Wood)

January 21, 1970

OPINION LETTER NO. 14

Honorable Joseph Jaeger, Jr.
Director of Parks
1204 Jefferson Building
Jefferson City, Missouri 65101



Dear Mr. Jaeger:

This is in reply to your letter in which you inquire if the State Park Board can institute overnight camping at Babler State Park and if the Park Board can lease portions of Babler Park to political subdivisions of the state for public use.

The deed of August 20, 1934, from Jacob L. Babler to the State of Missouri, recorded on August 23, 1934, at Book 1313, page 22 of the St. Louis County records conveyed a fee simple determinable estate. *Donehue v. Nilges*, 266 S.W.2d 553 (Mo. 1954); *Board v. Nevada School Dist.*, 251 S.W.2d 20 (Mo. 1952). That is, the State of Missouri was given a fee simple title with certain conditions attached, the breach of which vested in the grantor or his heirs the right of re-entry and reversion of title. Included among these conditions was that the property be continually used as a public park, that it never be reconveyed to third parties other than the City of St. Louis, County of St. Louis, or both jointly, that camping or hunting never be permitted on the property, and that the property never be leased except to public park concessionaires.

The land conveyed by this deed is recited to have been 864.-723 acres in United States Surveys 1956, 909, 668, 152 and 459 in Township 45 North, Range 5 [sic; should be 3] East of St. Louis County, Missouri.

Subsequent to the above deed, various adjoining tracts of land were given to the State of Missouri by different grantors, with the result of altering the boundary of Babler State Park prior to May, 1937. In a bill approved May 21, 1937, the General Assembly

Honorable Joseph Jaeger, Jr.

authorized the Governor, Attorney General, and the Game and Fish Commissioner to convey all of Babler State Park to Jacob L. Babler so that Jacob L. Babler could reconvey the entire park acreage to the State of Missouri subject to the terms and conditions of a Perpetual Endowment Trust Fund agreement (Laws 1937, pp. 514-518). Pursuant to this legislative authorization the aforesaid officials, on June 23, 1937, executed a deed to the park, including those portions deeded to the state in the meantime by other grantors, back to Jacob L. Babler. This deed was recorded on June 23, 1937, at 11 a.m. in Book 1420, page 634, St. Louis County records.

On June 23, 1937, Jacob L. Babler gave a deed to the entire park property to Lloyd C. Stark, Governor of the State, Roy McKittrick, Attorney General, and Wilbur C. Buford, Game and Fish Commissioner, for the use and benefit of the State of Missouri. This deed was made subject to the terms of a Perpetual Endowment Trust Fund theretofore established on May 28, 1937 (Book 1438, page 572, St. Louis County records) by and between Jacob L. Babler, Grantor and Henry J. Babler, Richard J. Weidert, Wilbur C. Buford, Harland Bartholomew and Roy McKittrick, Trustees, reserving the right of the Endowment Fund trustees to enter into the premises of the state park and reserving also to said trustees the control and management of the state park as provided in the Endowment Fund agreement. This deed provided that in the event the Endowment Trust Fund was insufficient to meet expenses and maintenance of the park, then the trustees could--at their option--surrender possession and control of the park to the state free of the terms and conditions of the Endowment Trust Fund agreement, provided that the park would forever be known as the "Dr. Edmund A. Babler Memorial State Park." In my opinion, this 1937 deed from Jacob L. Babler vested the State of Missouri with a fee simple title to the park property. This deed was filed for record at 11:02 a.m., June 24, 1937, at Book 1476, pages 91 through 94 of the St. Louis County records.

The Perpetual Endowment Trust Fund agreement vested the trustees with the power to "direct, supervise, and manage the Dr. Edmund A. Babler Memorial State Park" and to make such rules and regulations governing the park as "in their sole judgment and discretion may be deemed advisable and necessary under the circumstances." (Article 4). The trust was irrevocable, perpetual, and not subject to termination by the grantor, but the trustees were given the option, should the income from the trust fund prove insufficient to meet expenses of maintenance of the park, of surrendering possession of the park to the state, in which event the state would be "in no wise bound by the terms of said trust thereafter" (except for the name of the park) (Article 7).

In his will executed on the 17th day of July, 1942, Jacob L. Babler bequeathed the residue of his estate to a charitable trust

Honorable Joseph Jaeger, Jr.

which was to continue and endure for twenty years from and after the date of his death. The trustees were designated as Richard Weidert and Henry J. Babler (testator's brother) and they were directed to use the principal and income of the trust to assist the State of Missouri in maintaining, beautifying, developing and possibly enlarging the Dr. Edmund A. Babler Memorial State Park. Jacob Babler died on May 21, 1945, and his will was admitted to probate on July 19, 1945. Richard Weidert declined trusteeship and Mercantile Trust Company National Association of St. Louis was named co-trustee to serve with Henry J. Babler. Henry J. Babler died on February 17, 1956, and Mary Anne O'Brien was named to succeed him as a co-trustee. By Laws of 1965, page 387, the Missouri State Park Board was authorized to receive all personal and real property bequeathed or devised to the State by Jacob L. Babler and to use such property solely for the "maintenance, beautification and further development or enlargement of the Dr. Edmund A. Babler Memorial State Park in St. Louis County" (Section 253.350, RSMo). We understand that the Perpetual Endowment Fund trustees surrendered possession and control of the park to the State Park Board in 1965, and such action did, under the terms of the 1937 deed, set aside all provisions of the trust except the requirement that the park be called the "Dr. Edmund A. Babler Memorial State Park." On May 6, 1968, Mary Anne O'Brien and the Mercantile Trust Company National Association, as co-trustees under the will of Jacob L. Babler, conveyed various tracts in St. Louis County to the Missouri State Park Board. (trustees deed recorded on May 8, 1968, at 3:48 p.m., Book 6323, pp. 1274 through 1289 of the St. Louis County records)

It is my opinion that the 1937 deeds conveying Babler State Park (1) from the State of Missouri to Jacob L. Babler and, (2) from Jacob L. Babler to the State of Missouri, had the effect of **eradicating** for all purposes the August 20, 1934 deed from Jacob L. Babler to the State of Missouri.

" . . . It will be remembered that Henry C. Page conveyed by warranty deed to Charles E. Page in 1863, and afterwards by warranty deed to Emma S. Page in 1869. Both of those deeds conveyed an indefeasible estate in fee-simple absolute. Afterwards, in September 1893, Emma reconveyed to Henry, and in December Charles reconveyed to Henry. In this way Henry became again seised and possessed of an indefeasible estate in fee-simple absolute. . . ." (Wilson v. Fisher, 72 S.W. 665 (Mo. 1903) 1.c. 669)

Since the deed of June 23, 1937, from the duly authorized officers of the State of Missouri to Jacob L. Babler restored an indefeasible

Honorable Joseph Jaeger, Jr.

fee estate in Jacob Babler of the property theretofore conveyed by him to the State of Missouri, his subsequent deed of June 23, 1937, to the State of Missouri vested in the State of Missouri a fee simple estate to all of the property previously conveyed by him in 1934, but without the conditions and limitations, and especially the possibility of reverter, contained in the 1934 deed.

Applying a slightly different principle of law, the same result is reached because the possessor of a possibility of reverter (Jacob L. Babler) may divest himself of such by releasing it to the tenant in fee simple determinable (The State of Missouri). The release has the effect of turning the fee simple determinable into a fee simple absolute (Smith v. School District No. 6 of Jefferson County, 250 S.W.2d 795 (Mo. 1952); 28 Am. Jur. 2d, Section 185, pp. 325, 326). The conveyance on June 23, 1937, by Jacob Babler to the State of Missouri could be considered such a release, thereby extinguishing the conditions subsequent and the possibility of reverter that had been contained in the 1934 deed. This deed of June 23, 1937, in my opinion, vested a fee simple absolute title to the property previously conveyed by Jacob Babler in 1934, notwithstanding that it was given subject to the terms of the Perpetual Endowment Trust Fund agreement of May 27, 1937. This is so because of the absence in this latter deed of language creating a condition subsequent or providing for a re-entry or a reversion of the title in the event of non-compliance with the terms of the Perpetual Endowment Trust Fund. (Duncan v. Academy of the Sisters of the Sacred Heart at St. Joseph, Missouri, 350 S.W.2d 814 (Mo. 1961); Chouteau v. City of St. Louis, 55 S.W.2d 299 (Mo. en banc 1932)).

Although Jacob Babler made no express mention in his will of the Perpetual Endowment Trust Fund, it would appear from his statement that he had previously "given and deeded to the State of Missouri, a large tract . . . as a public park," (from Item 15 of the Will) that he recognized the continued validity of the Endowment Trust. Consequently, he apparently intended that the trustees of the testamentary trust created by the will would manage properties, both real and personal, separate and apart from the properties previously given to the State of Missouri subject to the control and management of the Perpetual Endowment Fund trustees. Therefore, the deed from Mercantile Trust Company National Association and Mary Anne O'Brien, to the State Park Board upon the expiration of the testamentary trust would not have affected the property conveyed to the state in 1937 and thus could not have effected a surrender of the possession and control vested in the Perpetual Endowment Fund trustees. However, as pointed out above the Perpetual Endowment Fund trustees did surrender possession and control of the park property to the State Park Board in 1965; and the State Park Board now has full possession, control, and management of the park property acquired in 1937. All of that part of the State Park which was deeded to

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the Missouri State Park Board by the Mercantile Trust Company National Association and Mary Anne O'Brien in 1968, to the extent that such property is separate and distinct from that conveyed to the state in 1937, would certainly be free and clear of the restrictions of the 1937 deed.

In view of the foregoing and in answer to your first question, I am of the opinion that there is no restriction on overnight camping applicable to the lands in the present Dr. Edmund A. Babler Memorial State Park which were conveyed to the State Park Board by Mercantile Trust Company National Association and Mary Anne O'Brien, trustees, on May 6, 1968. There is no specific camping prohibition in the 1937 deed to the state and to the extent the lands conveyed thereby remained subject to the general control of the Perpetual Endowment Fund trustees, such control expired when the Perpetual Endowment Fund trustees surrendered possession to the State Park Board in 1965. Consequently, there is nothing to interfere with the Park Board's use of 1937 land for camping.

As to your second question, whether or not the State Park Board may lease portions of the Babler State Park to political subdivisions of this state for public use, it is my opinion that the Park Board may so do so because the General Assembly has authorized the Board "to convey such lands or interest therein and [to use] the proceeds of such sale" for the maintenance, beautification and further development or enlargement of the Babler Park (Section 253.350-2, RSMo). (State ex rel. St. Louis County v. Evans, 139 S.W.2d 967, 969 (Mo. en banc 1940); Warner v. Fry, 228 S.W.2d 729, 730 (Mo. 1950)).

Furthermore, Section 1 of House Bill No. 711, 73rd General Assembly (Section 253.350-1, RSMo) provides that the Endowment Fund shall be composed of both real and personal property given to the state for the benefit of Babler Park by the will of Jacob L. Babler or otherwise. Section 2 of House Bill No. 711 (Section 253.360-1, RSMo) provides that "All income, interest, rights or rent earned through the operation of the fund shall also be credited to the fund" thus manifesting a legislative intent that the Park Board may in its discretion lease real property belonging to the fund and use such rental income toward the "maintenance, beautification, and further development or enlargement" of the park (Section 253.350-1, RSMo).

Yours very truly,

JOHN C. DANFORTH
Attorney General

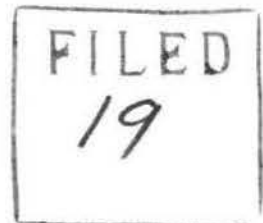
DIVISION OF HEALTH:
AGRICULTURE:

The provisions of the Missouri Dairy Law, Section 196.520 to Section 196.690, RSMo, do not prevent the Missouri Division of Health from exercising authority under the provisions of the Missouri Food, Drug and Cosmetics Act, Sections 196.010 to 196.120, RSMo.

OPINION NO. 19

July 6, 1970

L. M. Garner, M.D.
Acting Director
Department of Health
Broadway State Office Building
Jefferson City, Missouri 65101



Dear Doctor Garner:

This opinion is in response to your request which states as follows:

"May the Division of Health take action against an establishment or individual under the provisions of Sections 196.010 to 196.120, Revised Statutes of Missouri 1959 even though other Sections of Missouri Statutes assign authority to license and/or inspect said establishment to another agency of this State?

"This question is prompted by a request from the Missouri Department of Agriculture for assistance in eliminating manufacture and sale of adulterated cheese by cheese plants in Missouri. The General Assembly has vested the authority for the enforcement of the 'Missouri Dairy Law' (Sections 196.525 to Section 196.690 Revised Statutes of Missouri) to the Department of Agriculture. The Dairy Law requires the Department of Agriculture to inspect and license dairy products manufacturing plants.

The 'Missouri Food, Drug and Cosmetic Act'

Doctor L. M. Garner

(Sections 196.010 to 196.120) deals specifically with, and prohibits, adulteration, misbranding, false advertising and giving of guarantees for any food, drug or cosmetic.

"The question being asked is one which frequently arises when we are confronted with segments of the food industry which are inspected by other agencies, but perhaps without the consumer protection objectives of the Missouri Food, Drug and Cosmetic Act. Certainly, most, if not all, of the acts lack the comprehensive coverage of the specific areas of adulteration and misbranding as afforded by Sections 196.010 to 196.120 Revised Statutes of Missouri."

Section 196.535, RSMo 1959, vests the administration of the Missouri Dairy Law, which is contained within Sections 196.520 to 196.690, in the Commissioner of Agriculture. On the other hand, Section 196.045, RSMo 1959, vests the enforcement of the Food, Drug and Cosmetic Act, Sections 196.010 to 196.120 in the Division of Health.

The Missouri Dairy Law concerns dairy products which are stated and defined in the definition section of Section 196.525, RSMo Supp. 1967, whereas Section 196.015, RSMo 1959, pertains to food products in general as well as drugs, devices or cosmetics. Normally, it would seem that where specific powers and duties are restricted to, or vested in a specific office or body, others are prohibited from carrying out or exercising them. 73 C.J.S., Public Administrative Bodies and Procedure, Section 53, pp. 375-376. However, the powers and duties of particular administrative officers and agencies as against other officers and agencies are determined by the organic and statutory provisions which grant them their powers and define their duties.

We recognize that the Commissioner of Agriculture is authorized to promulgate regulations with respect to the Missouri Dairy Law. Section 196.555, RSMo 1959. Similarly, the Division of Health is authorized to promulgate regulations for the efficient enforcement of the Food, Drug and Cosmetic Act. Section 196.045, RSMo 1959. The question is, therefore, whether or not the Division of Health is precluded from acting under the authority vested in it for the enforcement of the Food, Drug and Cosmetic Act with respect to dairy products.

In our view, there is no readily determinable conflict

Doctor L. M. Garner

between the Missouri Dairy Law and the Food, Drug and Cosmetic Act. Essentially the Missouri Dairy Law, while containing numerous provisions that deal with sanitation, adulteration and other health measures, is nevertheless a licensing law as well as a health, sanitation and standards law.

Section 196.530, RSMo 1959, makes it clear that all dairy products bought or sold or offered or exposed for sale in this state shall not fall below the standards of quality in the ingredients provided for by the Missouri Dairy Law. This section would at least appear to indicate that the legislature did not intend that other applicable statutes might not provide for greater standards than those provided in the Dairy Law.

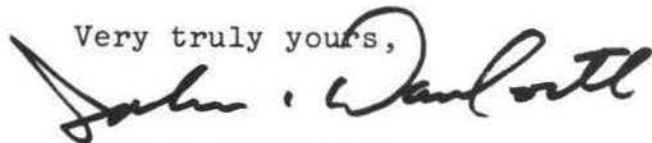
Our comparison and analysis of the Food, Drug and Cosmetic Act leads us to the conclusion that it is of a much greater scope than the provisions contained in the Missouri Dairy Law. Since both enactments are substantially concurrent, it is not possible to say that one being of a later date controls over the other. Nor is it possible, from our analysis, to say that the Missouri Dairy Law was enacted to the exclusion of the application of the Food, Drug and Cosmetic Act.

CONCLUSION

It is the opinion of this office that the provisions of the Missouri Dairy Law, Section 196.520 to Section 196.690, RSMo, do not prevent the Missouri Division of Health from exercising authority under the provisions of the Missouri Food, Drug and Cosmetic Act, Sections 196.010 to 196.120, RSMo.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Klauffenbach.

Very truly yours,

A handwritten signature in black ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

STATE RECORDS ACT:
PUBLIC RECORDS:

State Records Act does not apply to:
(1) Kansas City Police Board, (2) Kansas City Election Board, (3) Kansas City Area Transportation Authority, (4) Kansas - Missouri Air Conservation Commission, (5) "Bi-State Metropolitan Development District". State Records Act applies to: (1) Air Conservation Commission, (2) Crippled Children's Service, (3) Bridge Commissions.

OPINION NO. 20A

April 24, 1970

Honorable James C. Kirkpatrick
Secretary of State
State of Missouri
Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Kirkpatrick:

This is in response to your request for an opinion from this office as follows:

"The Board of Police Commissioners, Kansas City, is seeking to dispose of some records and has made inquiry of this office.

"This raises the question of whether or not certain agencies in State Government come under Chapter 109, the Public Records Act.

"In addition to the Boards of Police Commissioners, the question also applies to Boards of Election Commissioners, Bi-State Development Authorities, Bridge Commissions, Transportation Authorities, Air Pollution Authorities and Missouri Crippled Children's Service.

"In all of these cases the appointments are

Honorable James C. Kirkpatrick

made by the Governor. Does this make them State Agencies under the Public Records Act, and make it, therefore, our responsibility, under the Public Records Act, to inventory and make provisions for storing and/or destroying their records and to determine what is of archival importance? Also, there is the matter of microfilming."

Section 109.200 Mo. Supp. 1967, provides:

"Sections 109.200 to 109.310 shall be known as 'The State Records Law'."

Section 109.210 Mo. Supp. 1967, provides in part:

"(1) 'Agency', any department, office, commission, board or other unit;"

The question is whether these particular boards or commissions come within the term "Agency" as used in this statute.

Under a literal interpretation of this statute, it would apply to any and all offices, boards and commissions, public or private as well as public offices, boards, commissions and all units with limited authority and jurisdiction created by a county or city. However, a reading of the Act as a whole indicates it was intended to apply only to those public boards, commissions and offices of state-wide jurisdiction.

The reference in the title and in the act itself to "state records" shows the legislative intent that the act is applicable only to records of public boards.

We will consider each of the commissions and boards separately in chronological order as submitted in your letter.

Section 84.350, RSMo 1959, establishes a board of police commissioners for Kansas City consisting of four commissioners and the Mayor of Kansas City.

Section 84.360, RSMo 1959, provides that the Governor of the State with the consent of the Senate shall appoint the four commissioners, each for a definite term of office.

Section 84.420 Mo. Supp. 1967, provides the Board of Police Commissioners shall have the duty and responsibility to preserve the public peace and other designated authority within the boundaries of the city.

Honorable James C. Kirkpatrick

Section 117.050, RSMo 1959, provides for a board of election commissioners for Kansas City to be appointed by the Governor with the advice and consent of the Senate.

Section 117.050, RSMo 1959, provides that the board of election commissioners shall have charge and make provision for all elections to be held in such city or any part thereof, at any time.

It is the opinion of this office that the jurisdiction of the Board of Police Commissioners and the Board of Election Commissioners of Kansas City are not state-wide and therefore they do not come under the provisions of Section 109.200 to 109.310 Mo. Supp. 1967.

Section 234.370, RSMo 1959, provides for the Governor of this State to appoint five commissioners to enter into a compact under Section 234.360, RSMo 1959, with the State of Tennessee to plan, construct, maintain and operate a bridge across the Mississippi River near Caruthersville, Missouri.

Section 234.430, Mo. Supp. 1967, provides the Governor of the State of Missouri by and with the advice and consent of the Senate to appoint three commissioners to enter into a compact with the State of Illinois to plan, construct, maintain and operate a bridge across the Mississippi River at or near Canton, Missouri.

Section 234.580, Mo. Supp. 1967, provides that the Governor of the State of Missouri with the advice and consent of the Senate shall appoint three commissioners to enter into a contract with the State of Illinois to plan, construct, maintain and operate a bridge across the Mississippi River near Crystal City, Missouri.

Although the commissioners appointed under the above statutes are restricted geographically in the location of the bridge, they represent the State of Missouri at large in the performance of their duties and it is our opinion each of these commissions come under the provision of Section 109.200 to 109.310, Mo. Supp. 1967.

Section 238.010, Mo. Supp. 1967, provides that the Governor of the State by and with the advice of the Senate shall appoint three commissioners to enter into a compact with the State of Kansas to create a district known as the Kansas City Area Transportation District embracing Cass, Clay, Jackson and Platte Counties in Missouri for the purpose of operating and maintaining by lease or otherwise a passenger transportation system and facilities within this area.

Section 238.060 and 238.070, Mo. Supp. 1967, provide that

Honorable James C. Kirkpatrick

after the compact is entered into the Governor of the State shall appoint with the advice and consent of the Senate five commissioners each of whom must reside within the territory from which appointed as commissioners of the Kansas City Area Transportation Authority.

It is the opinion of this Department that the commissioners of the Kansas City Area Transportation Authority represent and have jurisdiction only in the geographical area of Cass, Clay, Jackson and Platte Counties in Missouri, and do not represent the State at large and are not a State commission under the provision of Section 109.200.

Section 203.040, Mo. Supp. 1967, provides for the Governor of the State with the advice and consent of the Senate to appoint six commissioners who with the Director of the Missouri Division of Health, shall compose the Air Conservation Commission of the State of Missouri, with authority regarding the prevention, abatement and control of air pollution. These commissioners have statewide authority and in our opinion come under the provisions of Section 109.200 to 109.310 Mo. Supp. 1967.

Section 203.600, Mo. Supp. 1967, provides for a Kansas - Missouri Air Quality Compact composed of a commission of five commissioners from the State of Missouri and five from the State of Kansas. It further provides the commission shall have jurisdiction over Cass, Clay, Jackson and Platte Counties in Missouri. The Commissioners must reside within the district. Under Section 203.610, Mo. Supp. 1967, the five commissioners from Missouri shall be appointed by the Governor and shall reside within the district. It is our opinion that since these commissions have jurisdiction only over Cass, Clay, Jackson and Platte Counties in Missouri, the commission does not come under the provisions of Sections 109.200 to 109.310 Mo. Supp.

Chapter 201, RSMo 1959, creates an agency of the State known as "Crippled Children's Service". Under Section 201.050, RSMo 1959, the Curators of the University of Missouri are designated as the administrators to administer the program under Sections 201.080 and 201.090, RSMo 1959, and all federal funds and State appropriations or gifts shall be administered by the administrator. These duties are statutory duties and have nothing to do with the constitutional authority of the Curators over the operation of the University.

It is our opinion this agency comes under the provisions of Section 109.200 to 109.310, Mo. Supp. 1967.

Section 70.380 RSMo 1959, provides for the Governor of Missouri with the advice and consent of the Senate to appoint

Honorable James C. Kirkpatrick

five commissioners to enter into a compact between the State of Missouri and the State of Illinois as provided in Section 70.370, RSMo 1959, to be known as the "Bi-State Metropolitan Development District" to embrace the City of St. Louis and St. Charles and Jefferson counties in Missouri and the counties of Madison, St. Clair and Monroe in Illinois. The authority and jurisdiction of this commission is restricted to the City of St. Louis and the counties of St. Charles and Jefferson in Missouri.

It is the opinion of this office that since this commission does not represent the State at large, but only the city and counties above mentioned, it does not come under the provisions of Section 109.200, supra.

CONCLUSION

It is the opinion of this office in regard to the State Records Act that:

1. The Board of Police Commissioners and the Board of Election Commissioners of Kansas City, Missouri, are not under the provisions of Section 109.200 to 109.310, Mo. Supp. 1967.

2. The Bridge Commissions created under Chapter 234 RSMo 1959 are under the provisions of Section 109.200 to 109.310, Mo. Supp. 1967.

3. The Kansas City Area Transportation Authority created under the provision of Chapter 238 Mo. Supp. 1967, is not under the provisions of Section 109.200 to 109.310 Mo. Supp. 1967.

4. The Air Conservation Commission created under the provisions of Chapter 203 Mo. Supp. 1967, comes under the provisions of Section 109.200 to 109.310 Mo. Supp. 1967.

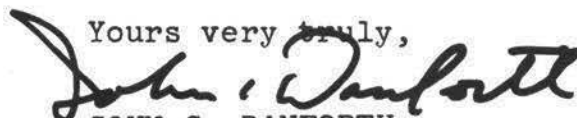
5. The Kansas-Missouri Air Commission created under Section 203.610 Mo. Supp. 1967 does not come under the provisions of Section 109.200 to 109.310, supra.

6. The agency known as the "Crippled Children's Service" established under Chapter 201, RSMo 1959 is under the provisions of Section 109.200 to 109.310, supra.

7. The "Bi-State Metropolitan Development District" created under Section 70.730 RSMo 1959, does not come under the provisions of Section 109.200 to 109.310, supra.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,


JOHN C. DANFORTH
Attorney General

January 12, 1970



OPINION LETTER NO. 21

Honorable Charles S. Broomfield
State Representative
District 87
4801 North Lister
Kansas City, Missouri 64119

Dear Representative Broomfield:

This letter was prepared to answer your question whether a city ordinance of North Kansas City is valid when such ordinance requires that the members of a planning and zoning commission be freeholders.

Section 71.150 of the Revised Statutes of Missouri, 1959, reads, in pertinent parts, as follows:

"Property qualifications for officers prohibited.--No property qualification shall be required of any person to render him eligible to any office in any city or incorporated town."

The ordinance of North Kansas City reads as follows:

"Sec. 2-51. The planning and zoning commission shall consist of six members, five of whom shall be freeholders. The membership of the first commission appointed shall serve respectively, one for one year, one for two years, one for three years, one for four years, and one for five years. Thereafter members shall be appointed for terms of five

Honorable Charles S. Broomfield

years each. The mayor of the city shall be an ex officio member of the planning and zoning commission. (Ord. No. 2509, § 4.)"

In the case of *Fore v. Hoke*, 48 Mo.App. 254, it was held that the word "freeholder" means the owner of an estate in fee in land.

Section 89.070, RSMo 1959, reads as follows:

"Zoning commission--appointment--duties.--
In order to avail itself of the powers conferred by sections 89.010 to 89.140, such legislative body shall appoint a commission, to be known as 'The Zoning Commission', to recommend the boundaries of the various original districts and appropriate regulations to be enforced therein. Such commission shall make a preliminary report and hold public hearings thereon before submitting its final report and such legislative body shall not hold its public hearings or take action until it has received the final report of such commission. Where a city plan commission already exists, it may be appointed as the zoning commission."

Section 71.150, supra, is a statute of general application governing the "qualifications * * * of any person to render him eligible to any office in any city or incorporated town." It would apply to members of the "planning and zoning commission" appointed under Section 89.070, supra. Thus, the requirement of the city's Section 2-51, supra, requiring its members be freeholders would run contrary to and be in violation of the provisions of Section 71.150, supra.

We conclude that Section 2-51 of the ordinance requiring the members of the Planning and Zoning Commission to be freeholders is in violation of Section 71.150, RSMo 1959, for the reasons stated above and illegal.

Very truly yours,

JOHN C. DANFORTH
Attorney General

COOPERATIVE AGREEMENTS:
COUNTY COURTS:
COUNTY CLERKS:

(1) Clay County can contract with the municipalities of Clay County to extend the taxes for said municipalities. (2) The County Clerk of Clay County has the discretionary authority to decide whether he will enter into a cooperative agreement with a municipality of Clay County to provide a common service pursuant to cooperative agreement statute; and assuming that the clerk of Clay County decides to enter such a contract, the contract must be taken before the county court of Clay County for approval. (3) Any consideration paid pursuant to a cooperative agreement contract for the extension of taxes between the county clerk of Clay County and the municipalities of Clay County must be paid into the county treasury.

OPINION NO. 23

January 21, 1970

Honorable P. Wayne Kuhlman
Assistant Prosecuting Attorney
Clay County Courthouse
Liberty, Missouri 64068



Dear Mr. Kuhlman:

This is in answer to your letter requesting an opinion of this office in which you ask whether Clay County can enter into a cooperative agreement with some municipalities of Clay County to extend the taxes for said municipalities. Additionally, you requested an opinion as to who would be the correct county official to perform this service.

Article VI, Section 16, Constitution of Missouri, provides as follows:

"Any municipality or political subdivision of this state may contract and cooperate with other municipalities or political subdivisions thereof, or with other states or their municipalities or political subdivisions, or with the United States, for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service, in the manner provided by law."

This section of the Constitution authorizes the legislature to pass laws respecting cooperative agreements between a municipality and a political subdivision for the planning, development, construction and acquisition or operation of any public improvement

Honorable P. Wayne Kuhlman

facility or for a common service. Implementing this constitutional provision, the legislature enacted Section 70.220, RSMo, which provides as follows:

"Any municipality or political subdivision of this state, as herein defined, may contract and cooperate with any other municipality or political subdivision, or with an elective or appointive official thereof, or with a duly authorized agency of the United States, or of this state, or with other states or their municipalities or political subdivisions, or with any private person, firm, association or corporation, for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service; provided, that the subject and purposes of any such contract or cooperative action made and entered into by such municipality or political subdivision shall be within the scope of the powers of such municipality or political subdivision. If such contract or cooperative action shall be entered into between a municipality or political subdivision and an elective or appointive official of another municipality or political subdivision, said contract or cooperative action must be approved by the governing body of the unit of government in which such elective or appointive official resides."

Thus, counties and cities may contract for a common service, in this instance, the extension of taxes, provided the subject and purpose is within the scope of their powers.

Pursuant to Section 137.290, RSMo, Clay County, acting through its county clerk, is given the authority to extend taxes in the assessor's books:

"The clerk of the county court in each county, upon receipt of the certificates of the rates levied by the county court, school districts and other political subdivisions authorized by law to make levies or required by law to certify levies to the county court or clerk of the county court, shall then extend the taxes in the assessor's book, in proper columns prepared for the extensions according to the rates levied. . . ."

Honorable P. Wayne Kuhlman

Further, by Section 93.100, RSMo, the auditor of a first class city is given the authority to extend taxes; by Section 93.455, RSMo, the city clerk of a second class city is given the authority to extend taxes; by Section 94.130, RSMo, the city clerk of a third class city is given the authority to extend taxes; and similarly, by Section 94.290, RSMo, the city clerk of a fourth class city is given the authority to extend taxes. Thus, the subject and purpose of a contract between Clay County and the municipalities in Clay County providing for the extension of taxes is within the scope of city and county powers, and it is the conclusion of this office that Clay County can contract with the municipalities of Clay County to extend taxes for said municipalities.

The question then becomes one of which county body or officer of Clay County has the duty and the authority to extend the taxes for Clay County. As we have noticed previously, pursuant to Section 137.290, supra, the extension of taxes is a duty of the county clerk. Thus, it is the further conclusion of this office that having been given the authority to extend taxes pursuant to Section 137.290, supra, the county clerk of Clay County can enter into a cooperative agreement with a municipality of Clay County pursuant to Section 70.220, supra, to perform the extension of taxes for said municipalities.

As can be seen, however, when the cooperative action entered into is between a municipality or political subdivision, and an elective or appointive official of another municipality or political subdivision, said contract of cooperative action must be approved by the governing body of the unit of government in which said elective or appointive official resides. In the instance under immediate consideration then, Section 70.220, supra, thus requires that before the county clerk of Clay County may enter into a cooperative agreement with the municipalities of Clay County, the county court of Clay County must approve said contract.

It is to be noted additionally that Section 70.220, supra, gives the discretionary authority to the contracting elective or appointive official as to whether he will in the first instance agree to the cooperative action:

"Any municipality or political subdivision of this state, as herein defined, may contract and cooperate with any other municipality or political subdivision, or with an elective or appointive official thereof. . ."

Thus, it is the conclusion of this office that the county clerk of Clay County in the first instance has the discretionary

Honorable P. Wayne Kuhlman

authority to decide whether he will enter into a cooperative agreement with a municipality of Clay County to provide a common service pursuant to the cooperative agreement statute, and assuming that the clerk of Clay County decides to enter such a contract, the contract must be taken before the county court of Clay County for approval.

The question thus arises as to whether consideration paid under a cooperative agreement is to be paid as a form of compensation to the county clerk, or is to be paid into the county treasury. The county clerk of Clay County receives compensation for his duties generally pursuant to Chapter 51, RSMo, as amended. Chapter 51 and the cooperative agreement statute are both silent as to any compensation to be paid to a county clerk who becomes party to a cooperative agreement contract. In similar instances the Supreme Court of Missouri has held that the mere fact additional duties are assumed by a county officer does not entitle him to additional compensation. Mooney v. County of St. Louis (Mo. Sup.), 286 S.W.2d 763. Additionally, the Supreme Court of Missouri has held that the right of a public officer to be compensated by salary or fees for the performance of duties imposed upon him by law is purely a creature of statute. Felker v. Carpenter (Mo. Sup.), 340 S.W.2d 696. Further, the court has held that before a public official may retain fees or other payments received by virtue of his office he must point out the statute authorizing such retention. State v. Ludwig (Mo. Sup.), 322 S.W.2d 841.

Thus, it is the conclusion of this office that any consideration paid pursuant to a cooperative agreement contract for the extension of taxes between the county clerk of Clay County and the municipalities of Clay County must be paid into the county treasury.

CONCLUSION

Therefore, it is the opinion of this office that:

(1) Clay County can contract with the municipalities of Clay County to extend the taxes for said municipalities.

(2) The county clerk of Clay County has the discretionary authority to decide whether he will enter into a cooperative agreement with a municipality of Clay County to provide a common service pursuant to cooperative agreement statute; and assuming that the clerk of Clay County decides to enter such a contract, the contract must be taken before the county court of Clay County for approval.

(3) Any consideration paid pursuant to a cooperative agreement contract for the extension of taxes between the county clerk

Honorable P. Wayne Kuhlman

of Clay County and the municipalities of Clay County must be paid into the county treasury.

The foregoing opinion, which I hereby approve, was prepared by my assistant Kenneth M. Romines.

Yours very truly,

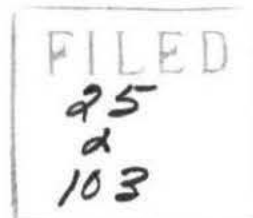
A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being more prominent.

JOHN C. DANFORTH
Attorney General

January 22, 1970

OPINION LETTERS 25 and 103
Answered by Gardner

Dexter D. Davis, Commissioner
Department of Agriculture
Jefferson Building
Jefferson City, Missouri 65101



Dear Commissioner Davis:

Reference is made to your recent letters from which it appears that you wish to establish and administer a program for using the money in the Agriculture Emergency Fund for emergency relief and rehabilitation. You request our opinion on the question whether an appropriation must be made by the Legislature in order to use any portion of these funds for administrative purposes.

You state that at the present time Missouri has approximately \$2,800,000.00 in that fund. This money consists of the trust assets of the Missouri Rural Rehabilitation Corporation which had been assigned to the Secretary of Agriculture of the United States and, on application by the Commissioner, returned to the State of Missouri pursuant to the Rural Rehabilitation Corporation Trust Liquidation Act, Public Law 499, 81st Congress, approved May 3, 1950 (64 Stat. 98).

The receipt of money by the State is controlled by Article IV, Section 15, of the Constitution of Missouri, which states in part as follows:

" . . . All revenue collected and moneys received by the state from any source whatsoever shall go promptly into the state treasury, and all interest, income and returns therefrom shall belong to the state. . . ."

Article IV, Section 28, of the Constitution of Missouri, describes the manner in which withdrawals may be made from the state treasury, and reads in part as follows:

Dexter D. Davis, Commissioner -

"No money shall be withdrawn from the state treasury except by warrant drawn in accordance with an appropriation made by law, nor shall any obligation for the payment of money be incurred unless the comptroller certifies it for payment and certifies that the expenditure is within the purpose of the appropriation and that there is in the appropriation an unencumbered balance sufficient to pay it. . . ."

Thus, an appropriation would be required to permit any portion of the Agriculture Emergency Fund to be withdrawn from the state treasury.

The last sentence of Article IV, Section 23, of the Constitution of Missouri, provides:

". . . Every appropriation law shall distinctly specify the amount and purpose of the appropriation without reference to any other law to fix the amount or purpose."

We understand that you suggest that the following provisions be included in the appropriation bill to be submitted to the Legislature at the Emergency Session:

"To the Governor. All money in the Agriculture Emergency Fund for investment, reinvestment, and for emergency agriculture relief and rehabilitation, including administrative expenses."

If the suggested provision is enacted into law, it is apparent that a specific appropriation is made for administrative expense in accordance with requirements of the Constitution of Missouri.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Answer by letter-Wieler

February 5, 1970

OPINION LETTER NO. 27

Honorable Haskell Holman
Auditor of the State of Missouri
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Holman:

This letter is in response to your request for an opinion on the following question:

"1. Is a County Court of a second class county empowered by any statutory provisions to employ an individual as Administrative Secretary to the County Court and expend county revenue funds for the salary of such employee?"

A search of the Missouri statutes reveals no express statutory provision authorizing a second class county court to employ such an individual. However, we note with approval the following passage from the case of *Aslin v. Stoddard County*, 341 Mo. 138, 106 S.W.2d 472, 475 (1937):

"By section 2078, R.S.1929, Mo.St.Ann. §2078, p. 2658, [49.270, RSMo 1959] it is provided that the county court 'shall have control and management of the property, real and personal, belonging to the county.' This express authority and duty carries with it the necessarily implied authority to employ such labor and service as may reasonably be requisite in order to effectuate the express power granted. Of such character is the work of a janitor, such as plaintiff herein. By the order of court and the contract pursuant thereto employing him he did not become an officer of

Honorable Haskell Holman

the county, but only an employee, to whom no attempt was made to delegate governmental or other such functions of the court which from time to time might involve matters of discretion to be exercised by that body. . . ."

It is our feeling that this language clearly authorizes second class county courts to employ individuals, whose labor and service are reasonably necessary in order that the county court may carry out the express powers granted to it by statute, as long as such employment does not involve an attempt by the county court to delegate functions of the court, which involve matters of discretion to be exercised by that body, to such individual. Also, the county court has no authority to hire an individual called an administrative secretary to perform any of the functions which are placed on other county officials by statute.

Section 50.550, RSMo 1959, provides that the county budget in second class counties shall contain adequate provision for the expenditures necessary for the salaries, office expenses, and deputy and clerical hire of all county officers and agencies. It also provides that all expenditures for operation and maintenance of the various county agencies shall be charged to the general fund.

Thus, it is our view that the express powers and duties given a second class county court by statute carry with them the implied authority to employ an individual called an "administrative secretary" and pay him out of general county funds only if such employment is necessary in order to effectuate the express powers granted the court.

Yours very truly,

JOHN C. DANFORTH
Attorney General

TAXATION (CITIES, TOWNS & VILLAGES):
EARNINGS TAX:

The cities of Kansas City
and Independence cannot,
whether by statute or by

city charter, enter into an agreement whereby each would rebate to
the other earnings taxes collected from residents of the other city.

OPINION NO. 28A

March 19, 1970

Honorable Jack E. Gant
State Senator-16th District
9517 East 29th Street
Independence, Missouri 64052



Dear Senator Gant:

This is in reply to your request for an official opinion of this office concerning the question whether the cities of Kansas City and Independence could enter into an agreement whereby each would rebate to the other earnings taxes collected from residents of the other city.

First, we observe that both Kansas City and Independence are constitutional charter cities and that the legislature has provided for an earnings tax in Kansas City. See Sections 92.210 through 92.300, RSMo. There is no comparable legislation authorizing an earnings tax for Independence.

Therefore, for purposes of this opinion we will have to assume that Independence will have an earnings tax similar to that provided for Kansas City.

The general scheme of the city earnings tax authorized by statute as it applies to individuals is to tax the earnings by salaries, wages, commissions and other compensation earned by its residents and also the earnings by salaries, wages, commissions and other compensation earned by non-residents of the city for work done or services performed or rendered in the city. See Section 92.210, RSMo Supp. 1967, and Section 92.110, RSMo 1959.

The basic scheme of the earnings tax has been upheld in *Walters v. City of St. Louis, Mo.*, 347 U.S.231, 74 S.Ct.505, 98 L.Ed.660, and in *Arnold v. Berra, Mo.*, 366 S.W.2d 321.

Honorable Jack E. Gant

Your question is whether the two cities can agree to rebate to the other earnings taxes collected on the other city's residents.

At this point we observe that if both cities had an earnings tax, residents of one city working in the other city would be paying a tax on his earnings to both cities. We know of no provisions of law to prohibit this situation.

We also observe that Kansas City has avoided such payment to both cities insofar as Kansas City residents are concerned by allowing a credit under Section 32.154, Earnings Tax Ordinance of Kansas City, which provides as follows:

"Credits for tax paid in another city.

"Every individual taxpayer who resides in the city but who receives profits, salary, wages, commission or other personal service compensation for work done or services rendered outside the city, if it be made to appear that he has paid a city income or earnings tax on such profits, salary, wages, commission or compensation in another city, shall be allowed a credit of the amount so paid by him or in his behalf in such other city, this credit to be applied only to the extent of the tax imposed by this article by reason of such profits, salary, wages, commission or compensation earned in such other city or cities where such tax is paid."

Again, we know of no provision of law to prohibit a taxing authority from granting such a credit.

Furthermore, we know of no law to prohibit each city from enacting an ordinance granting a tax credit to non-residents who have paid an earnings tax to the city of residence.

However, it is our opinion that the cities cannot rebate to the other city an earnings tax collected on non-residents. This in effect would mean that Kansas City would be collecting a tax for another city, but under Kansas City taxing authority. The same would be true of Independence.

Such provision, whether by statute or city charter, would violate the constitutional provisions that a municipality can only tax for its own purposes. Article X, Sections 1 and 11(b), Constitution of Missouri.

CONCLUSION

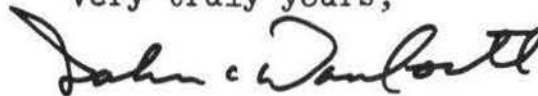
It is the opinion of this office that the cities of Kansas City and Independence cannot, whether by statute or by city charter, enter

Honorable Jack E. Gant

into an agreement whereby each would rebate to the other earnings taxes collected from residents of the other city.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Walter W. Nowotny, Jr.

Very truly yours,

A handwritten signature in cursive script, reading "John C. Danforth". The signature is written in dark ink and is positioned above the printed name and title.

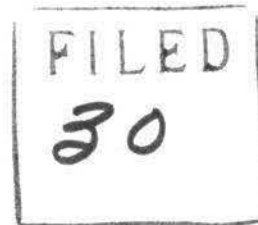
JOHN C. DANFORTH
Attorney General

Answer by Letter (Bartlett)

September 14, 1970

OPINION LETTER NO. 30

Honorable Robert H. Branom
State Representative
District No. 35
2151 69th Street
Hillsdale, Missouri



Dear Representative Branom:

This letter is in response to your request for a ruling on the following:

Is the immunity clause of, Chapter 168, Section 168.115, Missouri Revised Statutes, 1959, the Teacher Tenure Law constitutional; and, if so, what is its scope?

Section 168.129, RSMo 1969, contains the following immunity provisions:

"Board member exempt from civil liability resulting from charges against teacher.-- No member of a board of education or duly designated administrative officer of a board of education shall be liable in a civil action based on a statement of charges against a school teacher."

It is our understanding that your inquiry is whether such statute violates the provisions of Section 40(28) of Article III of the Constitution of Missouri.

Such section provides as follows:

"The general assembly shall not pass any local or special law:

#

Honorable Robert H. Branom

"(28) granting to any corporation, association or individual any special or exclusive rights, privilege or immunity, . . ."

". . . 'It is well established in this state that a law is not a special law if it apply to all alike of a given class, provided the classification thus made is not arbitrary or without reasonable basis.' . . ." ABC Liquidators, Inc. v. Kansas City, 322 S.W.2d 876, 885 (Mo. 1959)

In Marshall v. Kansas City, 355 S.W.2d 877, 884 (Mo. 1962) the Missouri Supreme Court stated:

". . . As a general rule, it is not what a law includes that makes it unconstitutional as a special law, but what it excludes, and a law is not special in the constitutional sense if it applies alike to all of a given class provided the classification thus made is not arbitrary or without a reasonable basis. . . ."

We believe that Section 168.129 is not a local or special law for the following reasons: (1) the classification is not arbitrary or without a reasonable basis and (2) the statute applies equally to everyone in the described class, and does not exclude anyone who should be included within the class. For the above given reasons, it is our view that this section would not violated Article III, Section 40(28) of the Missouri Constitution.

For many years school boards in Missouri have had a qualified privilege to make statements about teachers which would otherwise be defamatory. In Finley v. Steele, 159 Mo. 299, 60 S.W. 108 (1900), the defendants, members of the local school board, had written a letter to the county school commissioner accusing plaintiff, Mrs. Finley, a school teacher, of being "totally unfit to teach our school and being very tyrannical and abusive and indecent. . . ." The board went on to accuse her of whipping the children unmercifully, pulling their ears and otherwise mistreating the children. Mrs. Finley sued the defendants for \$10,000 damages in an action for defamation.

The Missouri Supreme Court stated:

"The publication in question was with respect to plaintiff as school teacher, and is, upon its face, clearly defamatory, and, if false,

Honorable Robert H. Branom

actionable per se, unless absolutely or qualifiedly privileged. Absolutely privileged publications are legislative and judicial proceedings and naval and military affairs, while a qualified privilege 'extends to all communications made bona fide upon any subject-matter in which the party communicating has an interest, or in reference to which he owes a duty to a person having a corresponding interest or duty, and to cases where the duty is not a legal one, but where it is of a moral or social character of imperfect obligation.' . . ." Id. at 109.

The court went on to discuss the limitations of a qualified privilege, saying that:

" . . . the 'party defamed may recover, notwithstanding the privilege, if he can prove that the words used were not used in good faith, but that the party availed himself of the occasion willfully and knowingly for the purpose of defaming the plaintiff.' . . .

* * *

" . . . a communication, to be privileged, must be made on a proper occasion, from a proper motive, and must be based upon reasonable or probable cause. When so made in good faith, the law does not imply malice from the communication itself, as in the ordinary case of libel. Actual malice must be proved before there can be a recovery, and in the absence of such proof a nonsuit should be granted. . . ." Id. at 109.

In Finley there was no statute conferring immunity on the board. Nevertheless, the court held that the teacher could not recover because the board had a qualified privilege to make the statements it did.

The decision in Finley was relied upon by the Missouri Supreme Court in Williams v. Kansas City Transit, Inc., 339 S.W.2d 792 (Mo. 1960). In this case plaintiff, an employee of defendant, was discharged. Plaintiff in due course requested from defendant a service letter. Defendant was under a statutory obligation to furnish plaintiff such a letter stating truthfully the reasons for discharge. After the letter was delivered to plaintiff, plaintiff sued defendant for libel.

Honorable Robert H. Branom

The Missouri Supreme Court held that, since defendant was under a statutory obligation to deliver the letter to plaintiff upon request, defendant enjoyed a qualified privilege that would protect him from a libel action unless actual malice were shown. Again, this qualified privilege was not provided by statute.

In both Finley and Williams, the party charged with defamation made the questioned statements in the course of fulfilling an obligation placed upon it by statute. In both cases the court held that in such a situation there was a privilege to make statements which, if untrue, would be defamatory unless the statements were not made in good faith.

The situation about which you inquire is similar to both Finley and Williams in that a school board is given the power by Section 168.114 to terminate an indefinite contract with a teacher for certain enumerated causes. Section 168.126 gives a board the power to terminate a probationary teacher's contract. In both instances, the board is required to communicate its charges to the teacher. Even without Section 168.129, a school board would be protected by a qualified privilege in carrying out its statutory duty under these sections. See Finley, *supra*, and Williams, *supra*. Therefore, we conclude that Section 168.129 is a codification of a qualified privilege already existing in Missouri.

It is our view that the immunity provision of the Teacher Tenure Law, Section 168.129, RSMo 1969, is not a special law within the meaning of Section 40(28) of Article III of the Constitution of Missouri. No member of a board of education or a duly designated administrative officer of a board of education shall be liable in a civil action based on a statement of charges against a school teacher so long as the statement of charges is within the statutory authority conferred on the board and the charges are made in good faith, without actual malice.

Yours very truly,

JOHN C. DANFORTH
Attorney General

(Answer by Letter) Blackmar A.

OPINION LETTER NO. 31

March 10, 1970

Honorable Haskell Holman
Auditor of Missouri
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Holman:

You have requested an opinion of this office on the following question:

"When a county court has, by order, under the provisions of paragraph 2, Section 137.230 Cumulative Supplement 1967, adopted a method for securing a full and accurate assessment of property liable to taxation and has included in the county budget funds to provide for the expenses thereof, the following question arises:

"Is it to be interpreted that the county court may employ clerical assistants to aid in the execution of the method adopted and to the extent of assisting the assessor in changing his official records in accordance with the method adopted?"

Section 137.230 (2), RSMo Supp. 1967, provides:

"2. In all counties the county court may, in addition to the foregoing provisions for securing a full and accurate assessment of all property therein liable to taxation, or in lieu thereof, by order entered of record, adopt for the whole or any designated part of the county any other suitable and efficient means or method to the same end, whether by procuring maps,

Honorable Haskell Holman

plats or abstracts of titles of the lands in the county or designated part thereof or otherwise and may require the assessor, or any other officer, agent or employee of the county to carry out the same, and may provide the means for paying therefor out of the county treasury."

In Opinion Letter No. 199, Conley, June 9, 1965, this office held that Section 137.230 does not permit the county court to pay clerical and stenographic expenses incurred by the assessor's office in notifying property owners of increased valuations or assessments in excess of the amounts allowed for clerical and stenographic expenses of the county assessor by other statutory sections. In reaching that conclusion, the opinion held the purpose of Section 137.230 (2) was to provide ". . . a means or method to 'ferret out' taxable property which may have escaped its legitimate burden of taxation. . . ." The opinion went on to observe that, ". . . Of course, all such necessary expenses and costs incident to such means or methods but limited to that purpose are payable from the county treasury." The opinion found that the payment of expenses incurred in notifying property owners of increased valuation or assessment was not incident to the discovery of the property and therefore was not a permitted expense under Section 137.230.

For purposes of this opinion, this office has been informed that the secretarial expenses are to be for transcribing the results of field investigations which discovers property--not fully and accurately assessed--to the official records of the assessor. Here we believe that secretarial and clerical expenses are incident to the discovery of the property pursuant to Section 137.230 and therefore may be properly paid by the county court notwithstanding other statutory provisions which limit the amount the court may expend for clerical and stenographic assistance to the county assessor. We believe that the payment of such expenses are necessary to effectuate the purpose of Section 137.230, RSMo Supp. 1967.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. Letter No. 199
6-9-65, Conley

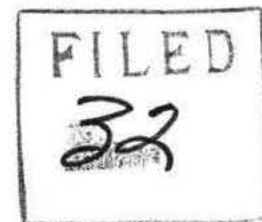
PREVAILING WAGE LAW:
PUBLIC WORKS:

The term "public works" as used in Section 290.210(7), RSMo 1969, of the prevailing wages law means structural works having a permanent character and usefulness, such as roads, buildings, bridges, and dams. The term "maintenance work," Section 290.210(4), RSMo 1969, means the repair or restoration of that portion of an existing facility which has fallen into a state of deterioration or decay to its original condition. "Maintenance work" does not include "major" repairs or "replacement;" the latter constitute "construction." "Replacement" entails the complete substitution of an existing facility with a new or different facility. Installing a central air conditioning unit in a public building constitutes "construction" within the meaning of Section 290.210(1), RSMo 1969, if the building was formerly without such a unit. Substituting a new central air conditioning unit or furnace in a public building in place of a deteriorated or worn out unit or furnace also constitutes "construction." However, replacing a worn out part of a central air conditioning unit or furnace in order to restore the unit or furnace to operational condition constitutes "maintenance work" within the meaning of Section 290.210(4), RSMo 1969. Installing new or different partitions in a public building, either at the location of former partitions or at a different location, and rearranging present partitions constitutes "construction," Section 290.210(1), RSMo 1969. However, restoring an existing partition to sound condition by repairing the deteriorated portion constitutes "maintenance work," Section 290.210(4), RSMo 1969. Tarring a roof of a public building constitutes "maintenance work," Section 290.210(4), RSMo 1969, if the roof is in a state of disrepair or deterioration, otherwise it would be "construction," Section 290.210(1), RSMo 1969. Putting an entirely new roof on a public building constitutes "construction," Section 290.210(1), RSMo 1969. Installing new garage doors on a public building constitutes "construction," Section 290.210(1), RSMo 1969. Seal coating small cracks in the surface of an asphalt highway constitutes "maintenance work," Section 290.210(4), RSMo 1969.

OPINION NO. 32

October 20, 1970

Honorable Richard M. Marshall
State Representative
Forty-third District
Suite 519
111 South Bemiston Avenue
Clayton, Missouri 63105



Dear Representative Marshall:

This opinion is issued in response to your request for an opinion regarding the meaning of the statutory definitions of

Honorable Richard M. Marshall

"public works," Section 290.210(7), RSMo 1969, and "maintenance work," Section 290.210(4), RSMo 1969. Specific reference is made to the coverage and application of the above definitions with regard to the following examples: replacement of a central air conditioning unit, furnace, changing of partitions, tarring a roof or putting on a new roof, putting on new garage doors, re-sealing a street.

Section 290.210 - 290.340, RSMo 1969, is known as the pre-bailing wages on public works law. The law applies to construction of public works by private contractors under contract with a public body. It does not apply to construction of public works by a public body's own employees. Opinion of the Attorney General No. 351, Vogelsmeier, August 3, 1970. (Copy attached.)

Section 290.210(1), RSMo 1969, defines "construction" as follows:

"(1) 'Construction' includes construction, reconstruction, improvement, enlargement, alteration, painting and decorating, or major repair."

The legislature may provide that certain words shall be defined or construed in a particular manner, but where statutory definitions are couched in general terms, it is necessary to apply normal rules of construction to ascertain the legislative intent. 82. C.J.S. Statutes, Section 315.

* According to the ruled maxim of *noscitur a sociis* doubtful words and phrases used in statutes are constructed in connection with the words and phrases with which they are associated. 82 C.J.S. Statutes, Section 331. Under this rule the meaning of a word may be enlarged or restricted by reference to the whole clause in which it is used. O'Malley v. Continental Life Ins. Co., 75 S.W.2d 837 (Mo. 1934).

By expressly including "painting and decorating" and "major repairs" within the statutory definition of "construction" in Section 290.210(1), RSMo 1969, it is apparent that the legislature intended to enlarge the meaning of the word "construction" so as to include more than is normally comprised with the ordinary meaning of the word.

Section 290.120(7), RSMo 1969, defines "public works" as follows:

"(7) 'Public works' means all fixed works constructed for public use or benefit or paid for wholly or in part out of public

Honorable Richard M. Marshall

funds. It also includes any work done directly by any public utility company when performed by it pursuant to the order of the public service commission or other public authority whether or not it be done under public supervision or direction or paid for wholly or in part out of public funds when let to contract by said utility. It does not include any work done for or by any drainage or levee district."

Section 1.090, RSMo 1969, provides that:

"Words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import."

Judicial rules of statutory construction are to the same effect. State v. Hawks, 228 S.W.2d 785 (Mo. 1950).

The term "public works", as used in prevailing wage laws, has been judicially defined to embrace such things as bridges, sidewalks, traffic control signals, radio antennas, and park benches, Miele v. Joseph, 113 N.Y.S.2d 689 (1952), and railways, docks, canals, waterworks and roads, Demeter Land Co. v. Florida Public Service Co., 128 So. 402 (Fla. 1930).

In Carter v. City and County of Denver, 160 P.2d 991 (Colo. 1945), the Supreme Court of Colorado stated that the term public works as used in connection with contracts for construction of public works in the Colorado Prevailing Wage Law was meant to embrace building and other structural contracts. Services of a hospital employee were therefore not included within the term public works.

Employers' Casualty Co. v. Stewart Abstract Co., 17 S.W.2d 781 (Comm. of Appeals, Tex. 1929), concerned the construction of the term "public works" as used in a statutory provision requiring contractors to execute a bond before entering a contract to construct public works. In that case the court stated that:

". . . every contract entered into, and every work undertaken by the state, county, municipality, or other agency enumerated in the statute is necessarily, in the broadest sense, a 'public work,' for such agencies are public agencies and act only for the public. But

obviously the words 'public work' were not used in that broad sense, for that would make the statute applicable to every contract of whatsoever character, a conclusion at once unreasonable. The 'public work' contemplated was meant to embrace those contracts akin to building contracts. This intention is not alone supported by the doctrine of ejusdem generis, but other language of the statute itself accentuates that construction, for it gives the right of intervention and recovery upon the bond to those persons who have furnished labor or materials 'used in the construction or repair of any public building or public work.' The words 'construction or repair' have reference alike to public buildings and public works, and indicate structural work. Again, throughout the act the word 'contractor' is used. This term is apt in building, and other structural, contracts but is inapt to those contracts which are essentially for services, supplies, equipment, and the like. The construction of a county road is a public work, but it could hardly be said that a contract for the purchase of a road grader would be a public work. Such grader would be in the nature of supply or equipment. . . ." Id at 782.

Thus, we believe the Legislature intended to use the term "public works" in Section 290.210(7), RSMo 1969, to describe structural works having a permanent character and usefulness, such as roads, buildings, bridges, and dams.

As stated above, the Missouri Prevailing Wage Law, Sections 290.210 to 290.340, RSMo 1969, applies only to construction of public works by private contractors under contract with a public body. "Maintenance work" on public works is specifically excluded from the scope of the law. Sections 290.220, 290.230, RSMo 1969. Thus, employees of private contractors performing "maintenance work" on public works need not be paid prevailing wages.

Section 290.210(4), RSMo 1969, defines "maintenance work" as follows:

"(4) 'Maintenance work' means the repair, but not the replacement, of existing facilities when the size, type or extent of the existing facilities is not thereby changed or increased."

Honorable Richard M. Marshall

The word "repair" contemplates restoring a structure or thing to a sound condition or keeping a structure in a state of preservation after decay, dilapidation, or partial destruction and necessarily presupposes that the structure has fallen into a state of deterioration. Gulf City St. Ry. & R. E. Co. v. City of Galveston, 7 S.W. 520 (Tex. 1888); Travelers Indemnity Company v. Wilkes County, 116 S.E.2d 314 (Ga. App. 1960), Walker v. Dwelle, 175 N.W. 957 (Iowa 1920). Work performed on existing facilities, or the elements or units of existing facilities, which are not in a state of deterioration does not constitute "maintenance work", but comes within the statutory definition of "construction". "Maintenance work" therefore, can only be performed on that portion of an existing facility which has deteriorated from its original condition.

"Major" repairs, however, constitute "construction" not "maintenance work". Section 290.210(1), RSMo 1969.

"Replacement" of existing facilities is specifically excluded from the statutory definition of "maintenance work", and thereby included within the definition of "construction".

Replacement of worn or deteriorated elements of a structure with similar or identical elements in order to restore the structure to its original condition is generally considered synonymous with repairing. However, substituting all of the elements or units of a structure with new or different units is commonly construed as replacement or reconstruction, not repair. Aro Mfg. Co. v. Convertible Top Replacement Co., 365 U.S. 336, 81 S. Ct. 599, 5 L.Ed.2d 592 (1961); Haussler v. Indemnity Co. of America, 227 Ill. App. 504 (1923); Mayer v. Morehead, 32 S.E. 349 (Ga. 1899).

You have requested our opinion concerning the coverage and application of the Missouri Prevailing Wage Law, Sections 290.210 to 290.340, RSMo 1969, with regard to the following examples: replacement of a central air conditioning unit, furnace, changing of partitions, tarring a roof or putting on a new roof, putting on new garage doors, and resealing a street. In the absence of a detailed account of the factual setting of each example, it is difficult to provide an appropriate and responsive opinion. However, by hypothesizing certain facts we are able to provide the following opinions for your guidance.

Installing a central air conditioning unit in a public building would constitute "construction", within the meaning of Section 290.210(1), RSMo 1969, in the event that the building was formerly without an air conditioning unit. Substituting a new central air conditioning unit in a public building in the place of a deteriorated or worn out unit falls within the judicial definition of "replacement", and therefore also constitutes "construction". How-

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ever, it is our opinion that replacing a worn out part of a central air conditioning unit in a public building in order to restore the unit to an operational condition constitutes a "repair" or "maintenance work".

The above analysis regarding installing a central air conditioning unit in a public building applies with equal force to replacing a furnace.

It is our opinion that installing new or different partitions, either at the location of a former partition or at a different location, and rearranging present partitions constitutes "construction" within the meaning of Section 290.210(1), RSMo 1969. However, restoring a deteriorated partition to sound condition constitutes "maintenance work" within the meaning of Section 290.210(4), RSMo 1969.

It is our opinion that tarring a roof of a public building constitutes "maintenance work" within the meaning of Section 290.210(4), RSMo 1969, if the roof is in a state of disrepair or deterioration. Otherwise, tarring a roof of a public building would constitute "construction" within the meaning of Section 290.210(1), RSMo 1969.

It is our opinion that putting an entire new roof on a public building falls within the above judicial definition of "replacement" or "reconstruction", and therefore constitutes "construction" within the meaning of Section 290.210(1), RSMo 1969.

It is our opinion that putting new garage doors on a public building does not constitute "maintenance work", but rather is "construction", because judicial definitions of "repair" entail restoring a deteriorated structure or article to its original condition, not substituting a new structure or article in its place.

In Attorney General Opinion No. 56, Walsh, April 18, 1968, this office expressed the opinion that seal coating small cracks in the surface of an asphalt highway did not constitute "construction" within the meaning of Section 290.210(1), RSMo 1969, and was therefore not subject to the prevailing wages on public works law. A copy of that opinion is enclosed.

CONCLUSION

Therefore, it is the opinion of this office that the term "public works" as used in Section 290.210(7), RSMo 1969, of the prevailing wages law means structural works having a permanent character and usefulness, such as roads, buildings, bridges, and dams. The term "maintenance work," Section 290.210(4), RSMo 1969,

Honorable Richard M. Marshall

means the repair or restoration of that portion of an existing facility which has fallen into a state of deterioration or decay to its original condition. "Maintenance work" does not include "major" repairs or "replacement;" the latter constitute "construction." "Replacement" entails the complete substitution of an existing facility with a new or different facility. Installing a central air conditioning unit in a public building constitutes "construction" within the meaning of Section 290.210(1), RSMo 1969, if the building was formerly without such a unit. Substituting a new central air conditioning unit or furnace in a public building in place of a deteriorated or worn out unit or furnace also constitutes "construction." However, replacing a worn out part of a central air conditioning unit or furnace in order to restore the unit or furnace to operational condition constitutes "maintenance work" within the meaning of Section 290.210(4), RSMo 1969. Installing new or different partitions in a public building, either at the location of former partitions or at a different location, and rearranging present partitions constitutes "construction," Section 290.210(1), RSMo 1969. However, restoring an existing partition to sound condition by repairing the deteriorated portion constitutes "maintenance work," Section 290.210(4), RSMo 1969. Tarring a roof of a public building constitutes "maintenance work," Section 290.210(4), RSMo 1969, if the roof is in a state of disrepair or deterioration, otherwise it would be "construction," Section 290.210(1), RSMo 1969. Putting an entirely new roof on a public building constitutes "construction," Section 290.210(1), RSMo 1969. Installing new garage doors on a public building constitutes "construction," Section 290.210(1), RSMo 1969. Seal coating small cracks in the surface of an asphalt highway constitutes "maintenance work," Section 290.210(4), RSMo 1969.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, B. J. Jones.

Very truly yours,



JOHN C. DANFORTH
Attorney General

Enclosures:

Op. No. 351
8-3-70, Vogelsmeier

Op. No. 56
4-18-68, Walsh

COURTS: An opinion with respect to House Bill No. 35
CLERKS OF COURTS: of the 75th General Assembly (Sections
FEES: 483.530 and 483.540, V.A.M.S.) relative to
COSTS: numerous questions concerning the fees of
clerks of certain courts of criminal
correction, circuit and common pleas courts.

February 11, 1970

OPINION NO. 33

Honorable James G. Lauderdale
Prosecuting Attorney
Lafayette County Court House
Lexington, Missouri 64067



Dear Mr. Lauderdale:

This letter is in response to your request concerning certain questions relative to fees of clerks of courts of criminal correction, clerks of circuit courts and of clerks of courts of common pleas. The questions arise out of the repeal of Section 483.530 and 483.540, RSMo 1959, and the two new sections that are enacted in lieu thereof by House Bill No. 35 of the 75th General Assembly also designated as Sections 483.530 and 483.540.

Section 483.530 of the corrected, truly agreed to and finally passed House Bill No. 35 of the 75th General Assembly states in full as follows:

"1. The clerks of the circuit courts, courts of criminal correction, and courts of common pleas of this state possessing criminal jurisdiction shall collect the following fees and no others for their services in criminal proceedings:

"For each criminal case-----\$7.50
For each appeal from municipal court---- 7.50

"The fees collected shall be paid into the county treasury as provided in section 483.560.

"2. No fee shall be charged by any clerk of a circuit court or of a court of common pleas

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possessing criminal jurisdiction in any criminal case against the state or any county, unless it is expressly allowed in this section; except that when any defendant in a criminal case shall be granted an appeal to the supreme court, the fees of the clerk for making out and certifying the transcript shall be paid by the state or county if the defendant shall be unable to pay the same."

Section 483.540 of the Bill states in full as follows:

"1. The clerks of the several circuit courts in counties of the first class having a charter form of government and in counties of the second, third and fourth class, and of the courts of common pleas, shall collect in all civil proceedings the following fees for their services:

"Each civil case, with one defendant-----	\$12.00
Each additional summons issued for	
additional defendants-----	1.00
Each alias summons issued-----	1.00
Each pluralis summons issued-----	1.00
Each third party defendant issued-----	1.00
Each appeal from municipal courts-----	10.00
Each appeal from magistrate courts-----	10.00

"In circuits where there are more than one section, room or division of the court, costs in any case shall be charged in only the division or divisions into which the case may be carried.

"2. All fees collected shall be paid into the county treasury as provided in section 483.560."

We will not quote the repealed sections, 483.530 and 483.540 in full. However, we will refer to portions of them as we answer the questions that have been posed.

The questions with the answers are separately stated in the order that you have given them to us.

With respect to the questions that you have captioned as relating to criminal costs:

"1. Does the Flat fee of \$7.50 include an unlimited number of continuances, subpoenas and certificates and seals?"

It is our view that the fees allowed in Section 483.530 of the Bill include all fees for services in criminal proceedings and since the previous provisions relating to a 25 cent charge for every subpoena and a 50 cent charge for each certificate and seal authenticating a copy of a record were repealed, the clerk has no authority to charge

Honorable James G. Lauderdale

any additional amount for continuances, subpoenas, certificates and seals.

"2. How about Grand Jury costs eliminated by H. B. 35? (No. 483.530 For swearing and entering each Grand Jury .50¢)

The previous provisions relative to grand juries allowed a 25 cent fee for every indictment returned by a grand jury and a 75 cent fee for a venire to summon a grand or traverse jury when one shall have been actually ordered and issued. Previous provisions also allowed a 50 cent fee for swearing and entering each grand jury. These provisions were specifically repealed and there is presently no authority for charging any such fees.

"3. What charges may be made for copies of records and papers, certified or otherwise?"

Previous Section 483.530 contained several provisions relative to charges and fees allowed for various copies. Inasmuch as these provisions have been repealed and other provisions enacted in lieu thereof, the clerk has no authority to charge for such copies and records and papers certified or otherwise.

"4. How about every acknowledgment of a deed eliminated by H.B. 35? (No.483.530 for every acknowledgment of a deed .50¢)

Previous Section 483.530 allowed a 50 cent fee for acknowledgment of a deed or other writing, including certificate and seal. Since this provision was repealed, there is now no authority for such a charge.

"5. What charges may be made in Parole cases?"

It is our understanding that parole cases are presently considered by many clerks as separate civil causes. On this basis, clerks have been charging the law library fee under Section 514.470, RSMo Supp. 1967, which allows the judge or judges of the circuit court or court of common pleas in certain counties to require the attorney or attorneys for the party filing the civil suit to deposit such a fee before summons shall issue.

We recognize that it is possible to consider a request for parole as a separate civil application. However, it is our view that such a fee cannot be required as a condition to the filing or hearing of such application and that a parole case is a continuation of a criminal action within the exception to that section. Therefore, we conclude that there is no authority to require separate charges in parole cases.

As regards your questions relating to civil costs:

"1. May a charge be made for extra Notices of Publication and Certified copies (as required in incorporation of Water (247.010) or Fire (321.520) Districts?"

Honorable James G. Lauderdale

It is clear, of course, that the publication charges of the newspaper must be paid, however we find no authority under the sections cited for the clerk to charge a fee for his services.

"2. What charges may be made for making extra copies of Commissioner's Reports?"

The repealed sections of Section 483.540 provided a fee of 35 cents for filing and entering a report of referees, sheriffs or commissioners. The repealed sections also allowed a fee of 10 cents for every hundred words of copies of records and papers. The repeal again appears to answer the question and leaves us with the conclusion that the clerk is no longer authorized to make such a charge.

"3. What charges may be made for copies of records and papers, certified or otherwise?"

Again, the authority to charge this fee was repealed and the clerk may no longer make such a charge.

"4. How many submissions to the Court are included in the Flat Fee charge of \$12.00?"

It is our view that present Section 483.540 allows \$12 for each civil case with one defendant and that it was the legislative intent that this fee cover the costs for that case no matter how many times it is tried.

"5. In case a Motion for Change of Custody is filed sometime after a final Decree in a Divorce or other case, does the flat fee again become due as costs?"

With respect to divorce fees, Section 193.370, RSMo 1959, allows the clerk of the court to charge 50 cents for each certificate prepared and forwarded by him to the state registrar to be taxed as costs in the case in which the decree was rendered. This fee provision still remains and was not repealed. It is not directly pertinent to your question, however we felt that it is worth the notation.

It is our opinion that a motion for change of custody filed after the final decree of divorce is to be considered a separate proceeding under Section 483.540 of the Bill and accordingly the fees authorized thereby may be charged for the motion. We believe that this is true regardless of the fact that it is obvious that such motions are a continuation of the original divorce action.

"6. What about execution costs in a case? (sometimes 10 & more)"

It is our belief that the flat fee provisions of Section 483.540 were intended to include all necessary subsequent execution costs

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since the execution of judgment is directly related to the case in principal.

"7. What basis of charge can be made in Change of Venue Transcripts?"

It is our understanding that you are not inquiring about the change of venue fee as prescribed by Civil Rule 51.17, but instead about the documentation transcribed. In accordance with our previous conclusions, we necessarily also conclude in answer to this question that the repealed sections covered the costs of such transcripts. However, there is no provision in the new Section 483.540 for such a charge; and accordingly, the clerk has no authority to make a separate charge for change of venue transcripts.

"8. Does each Exception in a Condemnation case become a case in itself?"

Initially, of course, a condemnation proceeding may include numerous defendants and as such initially constitutes one case. However, each exception or change of venue gives rise to separate proceedings, and such separate proceedings justify the charging of the fees provided by Section 483.540 of the Bill. State ex rel. vs Curtis, 283 S.W.2d 458 (1965).

"9. Does the flat fee cover jury and multiple jury trials?"

Section 494.170, RSMo 1959, contains certain provisions relative to costs of fees allowed jurors. However, these provisions are not related to the charges of the clerk. It is our view that the flat fee contained in the Bill covers all such civil cases whether tried by a jury or juries or by a judge.

"10. Does the flat fee in H.B. 35 cover orders and certificates and Seals without limit as to number?"

For the reasons that we have stated previously, we are of the view that the flat fee does cover such orders and certificates although hypothetically we are not able to say whether such orders and certificates and seals may be issued "without limit as to number."

"11. What about filing entering and recording Mechanics Liens?"

The previous section specifically covered filing and entering each mechanics lien and allowed a 30 cent fee therefor. However, this provision was not retained in the amended section and the clerk has now no authority to make such a charge.

"12. What about charges for a number of subpoenas?"

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Subpoenas are not covered under the new provisions of Section 483.540 although they were covered under the repealed section which allowed 25 cents for every subpoena in a civil case. There is presently no authority for the clerk to make an additional charge for the issuance of such subpoenas.

"13. What determines Cost in Trust Estates?"

Although a trust estate case is by nature ex parte, it is our opinion that the legislature intended the \$12 flat fees as provided in Section 483.540 of the Bill to apply.

"14. What about cost on Certificate & Seal taken separate?"

The previous provisions for certificates and seal allowed the clerk a fee of 50 cents whether or not it was in conjunction with the original case. That provision has been repealed and was not reenacted by the Bill. There is, therefore, no authority for the clerk to charge such fees.

"15. Hung Jury, case again tried, and additional subpoenas issued. Is this all included in a \$12.00 flat fee?"

In our view, the legislature intended that the flat fee would cover such a situation regardless of how many times the case had to go before a different jury and regardless of the number of subpoenas that need to issue.

Finally and most important, we are confronted with the question that you have not directly asked; but which is inherent in the framework of the questions presented. That is, whether the respective circuit courts have the authority to fix a rate of charge for services rendered by the clerks which are not directly related to the principal proceedings. We have concluded that the flat fee was intended to and did in fact replace the itemized charges relating to civil and criminal proceedings except as otherwise particularly specified. The remaining question concerns whether any charges can be made by such clerks for services required of them which are not directly related to the principal proceedings and not otherwise covered by statute. Some consideration has been given to the most difficult question of whether the respective circuit courts have authority to fix charges for such services. Obviously the courts have the inherent power to do all things which are necessary to preserve their existence. Pogue v. Swink, 284 S.W.2d 868,872 (1955).

Also, under Supreme Court Rule 50.01, the courts of appeal and the trial courts may make rules governing the administration of judicial business if the rules are not contrary to the rules of the Supreme Court, to the constitution, or the statutory law in force. We have been unable to find any Missouri or other case in support of the power of the circuit court to authorize the circuit clerk to fix charges for services in the absence of direct statutory authorization. It has been

Honorable James G. Lauderdale

held that where there is no statute fixing the fees of certain officers it was nevertheless beyond controversy that they were entitled to compensation for their services. Supreme Court of Iowa, Ripley v. Gifford, 11 Iowa 367 (1860).

That decision, of course, related to compensation as such and the Missouri rule with respect to the compensation of officers is that the officer cannot legally claim remuneration unless the statute has expressly conferred the right, Shed v. Kansas City, St. Joseph and Council Bluffs Railroad Company, 67 Mo.687 (1878); and such officer claiming fees for services must be able to put his finger on some statute expressly allowing the fee he claims. State ex rel. v. Board of Police Commissioners, 108 Mo.App.98, 82 S.W. 960 (1904). It must be borne in mind, however, that the large body of cases relating to the compensation of officers do not furnish us with a real guide in the present circumstances wherein the officers receive fixed compensation and the fees in question, if chargeable, would be payable into the county treasury.

It is our view that the rule-making power of the courts and the inherent power of the courts do not extend to or authorize such courts to empower the circuit clerks with the authority or the obligation to charge for the services that they render. The legislature has historically governed such charges as well as the related problems of the reimbursement of the circuit clerks and it is obvious from the legislation that we have just discussed that the legislature specifically repealed and withdrew from the circuit clerks the authority and obligation to make any such charges. Having done so, it is not within the province of the courts to supply any deficiency which the courts may believe the legislature created. In reaching this conclusion, we are governed by the fact that the business of the courts is the administration of justice and not the administration of county fiscal affairs.

We conclude that the legislature has withdrawn the authority of such circuit clerks to charge for certain services with some exceptions and that such circuit clerks still have the obligation to perform such services but have no right to levy charges therefor and the right to charge for such services cannot be granted by the circuit courts governing the circuits.

We note that in State v. Parker Distilling Co., 236 Mo.219, 139 S.W.453 (1911), the Supreme Court of Missouri on a motion for a rule by the Attorney General held unconstitutional a statute which directed the clerk of said court to distribute copies of opinions to litigants free of charge, citing as one reason that said statute was in violation of the constitutional prohibition against the use of public funds for private use. However, in view of the provisions of present Supreme Court Rule 83.28, which requires such distribution, we are of the opinion that the decision on the motion in State v. Parker Distilling Co. is not controlling.

Honorable James G. Lauderdale

We are also of the opinion that the extent and circumstances under which the courts may require the services of the clerks of such courts for the administration of justice is in each instance a decision that must be left to the courts.

CONCLUSION

This opinion with respect to House Bill No. 35 of the 75th General Assembly (Sections 483.530 and 483.540, V.A.M.S.) relative to numerous questions concerning the fees of clerks of certain courts of criminal correction, circuit and common pleas courts, as set out in detail in the opinion, was written by my assistant, John C. Klaffenbach, and is hereby approved.

Yours very truly,

A handwritten signature in cursive script, reading "John C. Danforth".

JOHN C. DANFORTH
Attorney General

January 12, 1970

OPINION LETTER NO. 36

Honorable John J. Johnson
Senator - 15th District
11001 Patrina Court
Afton, Missouri 63126



Dear Senator Johnson:

This letter is in response to your opinion request concerning whether or not the board of aldermen of a fourth class city can by ordinance provide for the appointment of special counsel when the mayor's temporary appointee and nominee for the office of city attorney is not acceptable to the board. You have furnished us with certain information including what purports to be an ordinance of the fourth class city appointing a person as special counsel and "acting city attorney" for a period of two years and for a designated consideration and authorizing said special counsel to perform the duties of the city attorney.

Insofar as the appointment of a temporary appointee to the office of city attorney is concerned, we note that Section 79.280, RSMo 1959, provides that in the case of a vacancy in any office which is not elective, the mayor shall appoint a suitable person to discharge the duties of such office until the first regular meeting of the board of aldermen thereafter, at which time such vacancy shall be permanently filled. We note also that Section 79.230, RSMo 1959, provides that the mayor with the consent and approval of the majority of the members of the board of aldermen shall have the power to appoint a city attorney.

In our Opinion No. 236, Meyer, 9/9/63, copy enclosed, we held that the mayor can appoint a temporary official to act until the first regular meeting of the board and that the mayor may appoint a temporary official who has been rejected by the board although he may not submit the nomination of any person as a permanent appointee who has previously been rejected. In our view, the conclusion reached in that opinion is correct and the mayor in this instance may continue to appoint a temporary appointee to the office of city attorney even though such appointee has not been approved by the city council as a permanent appointee.

Honorable John J. Johnson

Under Section 79.230, RSMo 1959, the mayor and the board of aldermen may, by ordinance, employ special counsel to represent the city, either in case of a vacancy in the office of city attorney or to assist the city attorney.

As we have stated, examination of the ordinance employing special counsel shows that the special counsel was employed to act as city attorney and to discharge duties peculiar to the office of city attorney.

We do not believe that there is any necessary conflict between the statutes authorizing the appointment of city attorney and the statute authorizing the appointment of special counsel. That is, the mayor has plenary authority to appoint the temporary city attorney and, as we have stated, may appoint as temporary city attorney a person who has been rejected as a permanent appointee. The temporary appointee under Section 79.280 is to "discharge the duties of such office" whereas the appointment of special counsel under the ordinance was to fill a vacancy in the office of city attorney. In our view, the appointment of a temporary city attorney by the mayor fills the vacancy of the office since the office necessarily is occupied by the appointed temporary city attorney. Since there is then no vacancy in the office within the meaning of Section 79.230, the appointment of special counsel to fill the vacancy in such office therefore terminates at such time as the temporary appointee is appointed or re-appointed.

We note that the additional question has been raised as to whether or not the city attorney of a fourth class city must be a resident of such city and whether special counsel need be a resident. Senate Bill No. 15 of the 75th General Assembly removed the residency requirements of previous Section 79.250 as it pertains to the office of city attorney, and the city attorney of a fourth class city need no longer be a resident of such city. Special counsel employed by the city is not an officer of the city and does not have to be a resident.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enc: Opinion No. 236, Meyer, 9/9/63

GENERAL ASSEMBLY:

LEGISLATIVE EMPLOYEES:

Section 21.150, RSMo Supp. 1967,
which allows the members of the
minority party of the House of

Representatives to employ one stenographer or secretary for
each five members of the minority party is not unconstitutional
when tested by the "one man-one vote" principle as articulated
by the Supreme Court of the United States.

OPINION NO. 37

April 30, 1970

Honorable Les Langsford
Representative, District 141
2311 South Dollison
Springfield, Missouri 65804



Dear Representative Langsford:

This official opinion is issued in response to your request
for an opinion with respect to the following inquiry:

"As you are no doubt aware, minority members
of the general assembly, by virtue of the
statute in caption, have a rough time in
their attempts to answer mail received from
their constituents.

Surely, the constituents in a legislative
district represented by a member of the
minority party in the Missouri General
Assembly are entitled to the same amount
of secretarial and clerical benefits as do
the constituents in a district represented
by a member of the majority party under the
concept of one man-one vote ruling handed
down by the Supreme Court of the United
States."

The statute to which you refer is Section 21.150, RSMo Supp.
1967, which provides, in part, as follows:

"2. The members of the minority
party of the house of representatives have
the right to employ one stenographer or

Honorable Les Langsford

secretary for each five members of the minority party; the minority floor leader and minority caucus chairman of the house of representatives each has the right to employ one additional stenographer or secretary, and the remainder of the officers and employees of the house of representatives, except the elective officers thereof, shall be selected or appointed by the members of the majority party of the house of representatives. The senate or house of representatives may each by resolution continue in employment at their regular salaries not more than fifteen officers or employees of each body for a period of not to exceed thirty days and not more than five officers or employees of each body for a longer period of time after the sine die adjournment of the general assembly, the number of employees and their term of employment to be fixed in the resolution. At least one such employee of the house of representatives and one employee of the senate shall be selected by the minority party, of each respective body."

The validity of this statute is ruled only with respect to your specific inquiry, which is whether the statute is violative of the "one man-one vote" principle articulated by the Supreme Court of the United States. We hold that the cited statutory provision is not violative of the "one man-one vote" principle articulated by the Supreme Court of the United States.

The cases of *Baker v. Carr*, 369 U.S. 186, 7 L.Ed.2d 663, 82 S.Ct. 691 (1962), *Reynolds v. Sims*, 377 U.S. 533, 12 L.Ed.2d 506, 84 S.Ct. 1362 (1964) and succeeding reapportionment cases, establish a basic constitutional principle which protects the right of all qualified citizens to vote and to have their votes counted and this includes protection from having one's vote diluted or debased. The challenged statutory provision does not affect the right of qualified citizens to vote or to have their votes counted, does not dilute or debase a person's vote, and, therefore, does not present a situation which would warrant application of the "one man-one vote" principle.

Honorable Les Langsford

CONCLUSION

It is, therefore, the opinion of this office that Section 21.150, RSMo Supp. 1967, which allows the members of the minority party of the House of Representatives to employ one stenographer or secretary for each five members of the minority party is not unconstitutional when tested by the "one man-one vote" principle as articulated by the Supreme Court of the United States.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Warren K. Morgens.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a prominent "D".

JOHN C. DANFORTH
Attorney General

Answer by letter (Morgens)

July 31, 1970

OPINION LETTER NO. 38

Honorable Joe D. Holt
State Representative
District 102
Baker Building
Fulton, Missouri 65251



Dear Representative Holt:

You have requested an opinion of this office on the following question:

"Request is hereby made for an opinion from your office concerning the ability of the County of Callaway to hire on a permanent basis certain personnel. The County revalued itself under the provisions of Section 137.037, revised status 1959 with supplements, having the election therefore in the year of 1966 and having the completed revaluation work turned over to the County Court in 1969. It is anticipated that substantial revenue will be realized in the next years from this revaluation. Presently, County and Local rates have been reduced by the appropriate authorities as required by statute and the tax books are being extended. As you will see by the attached cards which are examples of actual properties assessed by Honeycutt and Associates, the private reappraisal firm that was hired, extensive changes have been made from the old assessment procedures,

Honorable Joe D. Holt

as you will also see by the enclosed smaller card. The County Court is most desirous of maintaining these cards and the assessment figures in a current status.

"It is indeed fortunate that we have presently available to us a man who was employed by Honeycutt and Associates and who worked for them during their entire time here in Callaway County. He is trained in the methods that Honeycutt used and is also trained in the manner of computing valuations that the County Court desires to maintain. In short, he is an expert in this particular aspect. I thus request your official opinion if the County Court may deal out to retain this particular individual at a reasonable salary, from general revenue, to maintain the records, plats, photomaps, etc., that the County has had turned over to it from Honeycutt and Associates and if this person may be made an employee of the County Court. The County Court has been told that Section 50.680 or the Assessors Budget will not permit this employee. I therefore request your opinion if he can be hired by the County Court in order to maintain these records, etc., as set out above."

We understand your inquiry to be whether payment of this individual can be made as provided in Section 137.230(2), RSMo 1969 which provides:

"2. In all counties the county court may, in addition to the foregoing provisions for securing a full and accurate assessment of all property therein liable to taxation, or in lieu thereof, by order entered of record, adopt for the whole or any designated part of the county and other suitable and efficient means or method to the same end, whether by procuring maps, plats or abstracts of titles of the lands in the county or designated part thereof or otherwise and may require the assessor, or any other officer, agent or employee of the county to carry out the same, and may provide the means for paying therefor out of the

Honorable Joe D. Holt

county treasury." (Emphasis added.)

The above statute has been interpreted by this office in both Opinion Letter No. 199, Conley, June 9, 1965 and Opinion Letter No. 31, Holman, March 10, 1970, copies of which are enclosed. We believe that your opinion request can be answered by reference to the reasoning employed in the above-mentioned opinions. In both of those opinions, this office determined that Section 137.230 would not permit a county court to pay expenses incurred by the county assessor unless such expenses were incidental to the discovery of taxable property for purposes of property assessments. In Opinion Letter No. 199, Conley, it was held that the purpose of Section 137.230(2) was to provide ". . . a means or method to 'ferret out' taxable property which may have escaped its legitimate burden of taxation. . . ." The same opinion went on to state that, ". . . of course, all such necessary expenses and costs incident to such means or methods but limited to that purpose are payable from the county treasury." The opinion concluded that payment of expenses incurred in notifying property owners of increased valuation or assessment was not incident to the discovery of property and therefore was not a permitted expense under Section 137.230. Subsequently, in Opinion Letter No. 31, Holman, this office applied the same test in determining that secretarial expenses in connection with transcribing the results of field investigations which discovered property were incidental to the discovery of the property for assessment and therefore were a permitted expense under Section 137.230.

The expense anticipated by your opinion request appears to be for the employment of an individual whose job will be ". . . to maintain the records, plats, photomaps, etc., that the county has had turned over to it. . . .", after certain properties have already been discovered and assessed pursuant to a new assessment procedure recently inaugurated in the County of Callaway. Notwithstanding, the obvious need for adequate and up-to-date maintenance of property assessment records and other items in connection with such, we do not believe that such an expense is incidental to the discovery of assessable property (i.e., ". . . for securing a full and accurate assessment. . . .") within the meaning of Section 137.230 (Emphasis added).

We accordingly hold that payment of the expense anticipated in your opinion request is not necessary to effectuate the purpose of Section 137.230, RSMo 1969, and is thus not allowable as an expense under such section.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosures:

Opinion Letter No. 199,
6-9-65, Conley

Opinion Letter No. 31,
3-10-70, Holman

March 23, 1970 OPINION LETTER NO. 39
(Answered by letter-
Nowotny)

George A. Ulett, M. D.
Director
Division of Mental Diseases
722 Jefferson Street
P. O. Box 687
Jefferson City, Missouri 65101



Dear Dr. Ulett:

This is in reply to your request for an opinion of this office as to whether the Canteen at the Farmington State Hospital is liable for state sales taxes, such Canteen being operated by the Farmington Assistance League. Your letter sets out the details of operation and being quite lengthy is attached hereto as a statement of the facts.

If the Canteen is exempt from the sales tax it would be so under Section 144.040, RSMo 1959, which reads as follows:

"In addition to the exemptions under section 144.030 there shall also be exempted from the provisions of sections 144.010 to 144.510 all sales made by or to religious, charitable, eleemosynary institutions, penal institutions and industries operated by the department of penal institutions or educational institutions supported by public funds or by religious organizations, in the conduct of the regular religious, charitable, eleemosynary, penal or educational functions and activities, and all sales made by or to a state relief agency in the exercise of relief functions and activities."

The organization in question is clearly not a penal institution or an educational institution supported by public funds. Therefore, to be exempt the organization must qualify as either a religious or charitable institution.

George A. Ulett, M. D.

Basically the purpose of the Canteen is to make available certain common necessary items for purchase by the patients or families visiting the patients. All of the proceeds are then used for recreational and rehabilitation purposes. Operation of the Canteen also serves as a rehabilitation function.

The reason for granting state tax exemptions for charitable organizations is in return for the performance of functions which benefit the public and the exemption in favor of charitable institutions is based upon the ground that a benefit is conferred upon the public by them with consequent relief, to some extent, of the burden imposed upon the state to care for and advance the interests of its citizens. *Bethesda General Hospital v. State Tax Commission, Mo.*, 396 S.W.2d 631 (1965); 84 C.J.S. Taxation, Section 281, p. 533; 51 Am.Jur.Taxation, Section 600, p.583; 34 A.L.R.635.

Therefore, it is our opinion that the Canteen at the Farmington State Hospital for Missouri is exempt from the sales tax law under Section 144.040, RSMo.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Encls:

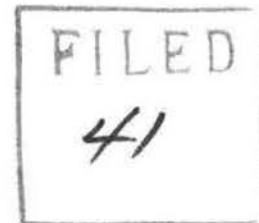
Copy Letter
from George A. Ulett, M.D.
October 15, 1969.

Answer by letter-Wood

January 13, 1970

OPINION LETTER NO. 41

Mr. Joseph Jaeger, Jr.
Director of Parks
State Park Board
P. O. Box 176
Jefferson City, Missouri 65101



Dear Mr. Jaeger:

In your recent letter you asked for our opinion whether Senate Bill No. 36, 75th General Assembly covers employees of the Missouri State Park Board, and, if so, what obligation is on the General Assembly to appropriate funds in accordance with proposals presented by a bargaining representative and accepted by the Park Board.

Senate Bill No. 36 is a repeal and reenactment of Section 105.-510, RSMo (L. 1965, p. 232; A.L. 1967, p. 193). Enclosed are two opinions issued in 1966 and 1967 interpreting Section 105.510, RSMo. The 1969 Amendment to the section (Senate Bill No. 36) made no change material to your inquiry.

Based upon these opinions, it is our view that Park Board employees are covered by the law, but that salary or other proposals presented by a bargaining representative and accepted by the Park Board in its discretion cannot obligate the General Assembly in the matter of appropriations to the Park Board.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 68
5-6-66, Garrett,
Davis and Schapeler

Op. No. 373
10-17-67, Thompson

TAXATION (CIGARETTE TAX):
CIGARETTE TAX:
CONSTITUTIONAL LAW:

House Committee Substitute for Senate
Substitute for Senate Bills Nos. 1,
185 and 215 of the 75th General As-
sembly is not unconstitutional in
violation of Article III, Section
23, Missouri Constitution.

OPINION NO. 42

January 14, 1970

Honorable J. J. Schorgl
State Representative
District No. 9
126 North Quincy
Kansas City, Missouri 64123



Dear Representative Schorgl:

This is in reply to your request for an official opinion of
this office which request reads as follows:

"Would you please give me your opinion as to
whether or not House Committee Substitute for
Senate Substitute for Senate Bills Nos. 1, 185
and 215 is constitutional pursuant to Article
III, Section 23 of the Missouri Constitution."

Article III, Section 23, Missouri Constitution, reads as
follows:

"No bill shall contain more than one subject
which shall be clearly expressed in its title,
except bills enacted under the third exception
in section 37 of this article and general ap-
propriation bills, which may embrace the var-
ious subjects and accounts for which moneys
are appropriated."

"Title" as used in this constitutional provision means the
designation prefixed to an act of the Legislature which defines the
character of legislation. State on Inf. of Wallach v. Beckman, 353
Mo. 1015, 185 S.W.2d 810.

The "title" of House Committee Substitute for Senate Substitute
for Senate Bills Nos. 1, 185 and 215 of the 75th General Assembly
reads as follows:

"To repeal sections 149.010, 149.020, 149.030,
163.036, 163.131, 163.141, 163.161, RSMo Supp.

Honorable J. J. Schorgl

1967, and sections 163.031 and 163.033, Laws of Missouri, first extra session, pages 881-883, 1967, relating to certain taxes allocated for school purposes and state aid to school districts, and to enact in lieu thereof seven new sections, relating to the same subject, with an emergency clause and an effective date."

Chapter 149, RSMo, is the Missouri cigarette tax law. Section 149.010 is the definition section; Section 149.020 imposes the tax; and Section 149.030 provides for cigarette tax stamps.

Chapter 163, RSMo, provides for state aid to school districts, such aid to be distributed under certain conditions and according to certain formulas. Section 163.036 provides for estimates of average daily attendance; Section 163.131 provides for special aid to school districts with certain numbers of orphans or dependent children; Section 163.141 requires reports from each district entitled to aid to the state board of education; Section 163.161 provides for state aid for transportation of pupils in school districts; Section 163.031 provides for an equalization quota; and Section 163.033 provides for a second level equalization quota.

The question is whether the title of the act contains more than one subject which is expressed in its title.

The purpose of the constitutional provision is to limit the subject matter of a bill to one general subject and to afford reasonable definite information to the members of the general assembly and the people as to the subject matter dealt with by the bill. *State ex rel. Taylor v. Wade*, 360 Mo. 895, 231 S.W.2d 179. It is also said that the purpose of the constitutional provision is to prevent incongruous disconnected matters which have no relation to each other from being joined in one bill, but such provision does not prevent the joinder of all matters that are germane to the principal subject, and have a natural connection with it. *State v. Brodnax*, 228 Mo. 25, 128 S.W. 177, affirmed *Brodnax v. State of Missouri*, 291 U.S. 285, 31 S.Ct. 238, 55 L.Ed. 219. See also *State ex rel. Niedermeyer v. Hackmann*, 292 Mo. 27, 237 S.W. 742, where it is said that the constitutional provision does not prevent the inclusion in one bill, under one general title, of subjects naturally and reasonably related to each other.

This constitutional provision though mandatory, must be given a reasonable construction. *State on Inf. of Wallach v. Beckman*, 353 Mo. 1015, 185 S.W.2d 810. The provision is to be wisely and liberally interpreted and not to be so applied as to thwart the efficiency of intelligent and salutary legislation. It does not

Honorable J. J. Schorgl

forbid the inclusion in one bill, under one general title, of subjects naturally and reasonably related to each other. *Burge v. Wabash R. Co.*, 244 Mo. 76, 148 S.W. 925. Also, when all the provisions of the statute fairly relate to the same subject, have a natural connection with it, are the incident or the means accomplishing it, then the subject is single. *Ewing v. Hoblitzelle*, 85 Mo. 64.

In a case concerning a sales tax act, it was said that the constitutional provision does not require that every separate tax or every separate legislative thought be in a different bill, and it is sufficient if the matters in the statute are germane to the general subject therein. *State ex rel. Transport Mfg. and Equipment Co. v. Bates*, 359 Mo. 1002, 224 S.W.2d 996. And, in *State ex rel. Bier v. Bigger*, 352 Mo. 502, 178 S.W.2d 347, it was said that an act entitled as relating to the administration of estates was not objectionable as containing more than one subject although it related to administration, proof of wills and limitations thereon, and inheritance taxes.

See also *Rauch v. Himmelberger*, 305 Mo. 70, 264 S.W. 658, and *State ex rel. Clark v. Gordon*, 261 Mo. 631, 170 S.W. 892.

Pursuant to these rules the question, therefore, is whether the provisions of the cigarette tax fairly relate to the provisions concerning state aid to school districts.

Section 149.100, RSMo 1959, reads as follows:

"All taxes collected pursuant to this chapter shall be deposited in the state treasury to the credit of the state school moneys fund."

The state school moneys fund is used in part to carry out the purposes of Chapter 163. See Section 163.031, 163.061 and 163.081.

Therefore, interpreting the title of the act liberally, it is our opinion that the act does not violate Article III, Section 23, Missouri Constitution, because the cigarette tax law relates to the state aid to school districts law in that the tax money is used to accomplish the purposes of the state aid law. We think that the members of the general assembly and the public were afforded reasonable definite information as to the subject matter of the bill.

The various sections of the act have a natural connection and the tax sections are the means of accomplishing the state aid sections and to hold this act unconstitutional would thwart the efficiency of intelligent and salutary legislation.

Honorable J. J. Schorgl

CONCLUSION

Therefore, it is the opinion of this office that House Committee Substitute for Senate Substitute for Senate Bills Nos 1, 185 and 215 of the 75th General Assembly, providing for an increased state cigarette tax and amending statutes providing for state aid to school districts, is not unconstitutional in violation of Article III, Section 23, Missouri Constitution.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Walter W. Nowotny, Jr.

Yours very truly,

A handwritten signature in black ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being particularly prominent.

JOHN C. DANFORTH
Attorney General

ELECTIONS:
INITIATIVE & REFERENDUM:
PETITION:

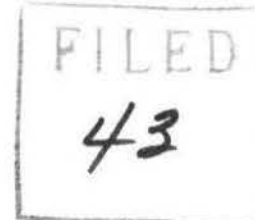
(1) A person who wilfully and falsely executes a verification affidavit on a referendum petition may be punished therefor by a fine not exceeding \$500

or by imprisonment in the penitentiary not exceeding two years, or by both such fine and imprisonment. (2) The Secretary of State is not under a statutory duty to forward such information as he might possess regarding the wilful and false execution of a verification affidavit on a referendum petition to appropriate prosecuting officials.

OPINION NO. 43

March 30, 1970

Honorable James C. Kirkpatrick
Secretary of State
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Kirkpatrick:

This opinion is issued in response to your request for an official opinion on the following questions relating to referendum petitions:

" * * * *

c. What is the penalty for falsely executing the verification affidavit?

* * * *

(3.) Is it the duty of this office (the Office of the Secretary of State) to forward such information (as might be received by the office indicating that the verification affidavits have been incorrectly or falsely made) to appropriate authorities for possible criminal proceedings."

In answer to your first question, it is the opinion of this office that the penalty for wilfully and falsely executing a verification affidavit is set forth in Section 126.100, RSMo 1959, which provides for a fine not exceeding \$500 or by imprisonment in the penitentiary not exceeding two years, or by both such fine and imprisonment.

Section 126.040, RSMo 1959, provides:

Honorable James C. Kirkpatrick

"Each and every sheet of every such petition containing signatures shall be verified in substantially the following form by the person who circulated said sheet of said petition, by his or her affidavit thereon and as part thereof:

State of Missouri,)
) ss.
County of _____.)

I, _____, being first duly sworn, say (here shall be legibly written or typewritten the name of the signers of the sheet), signed this sheet of the foregoing petition, and each of them signed his name thereto in my presence; I believe that each has stated his name, post office address and residence correctly, and that each signer is a legal voter of the state of Missouri and county of _____.

(Signature and post office address of affiant.)

Subscribed and sworn to before me this ____ day of _____, A. D. 19__.

(Signature and title of officer before whom oath is made and his post office address.)

The forms herein given are not mandatory, and if substantially followed in any petition it shall be sufficient, disregarding clerical and merely technical errors."

Section 126.100, RSMo 1959, provides:

"Every person who is a qualified elector of the state of Missouri may sign a petition for the referendum or for the initiative of any measure on which he is legally entitled to vote. Any person signing any name other than his own to any petition, or knowingly signing his name more than once for the same measure at one election, or who is not at the time of signing the same a legal voter of this state, or any officer or person willfully violating any provision of this chapter, shall, upon conviction thereof, be punished by a fine not exceeding five hundred dollars or by imprisonment in the penitentiary not exceeding two years, or by both such fine and imprisonment." (Emphasis ours.)

Honorable James C. Kirkpatrick

We conclude that one who wilfully and falsely executes a verification affidavit under Section 126.040, RSMo 1959, is a person who wilfully violates a provision of such chapter within the meaning of Section 126.100, and is, therefore, subject to the penalty prescribed therein.

In reaching this conclusion, we have considered the possible application of Section 557.070, RSMo 1959, relating to making a false affidavit, which provides:

"Every person who shall willfully, corruptly and falsely, before any officer authorized to administer oaths, under oath or affirmation, voluntarily make any false certificate, affidavit or statement of any nature, for any purpose, shall be deemed guilty of a misdemeanor, and shall upon conviction be punished by imprisonment in the county jail not less than six months, or by fine not less than five hundred dollars."

As previously indicated, we find that the penalty prescribed in Section 126.100, supra, is applicable as a specific penal provision rather than the general prohibition of Section 557.070, supra. Our determination has been predicated upon the principles set forth by the Supreme Court of Missouri in *State v. Richman*, 347 Mo. 595, 148 S.W.2d 796, 799 (1941), which quoted with approval the following from *State ex rel. County of Buchanan v. Fulks*, 296 Mo. 614, 247 S.W. 129, 132:

"Where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them the special will prevail over the general statute. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; . . ."

Therefore, we find and conclude that the provision of Section 126.100, RSMo 1959, constitutes a special statute applicable, in part, to situations where a person has wilfully and falsely executed a verification affidavit on an initiative or referendum petition.

Honorable James C. Kirkpatrick

Your second question is whether it is the duty of the Office of the Secretary of State to forward such information concerning the false execution of a verification affidavit to appropriate authorities for possible criminal proceedings. We have examined the various statutory provisions relating to the duties of the Secretary of State and can find no provision which imposes a mandatory duty upon the Secretary of State to forward such information to the appropriate prosecuting officials. The failure to specifically impose such a duty by statutory provision does not preclude the Secretary of State from forwarding such information to appropriate prosecuting officials. Obviously, the basic tenets, of citizenship in general, and, proper fulfillment of a public official's responsibilities in particular, would dictate that a person having knowledge of such a violation would forward that information to the appropriate prosecuting officials.

CONCLUSION

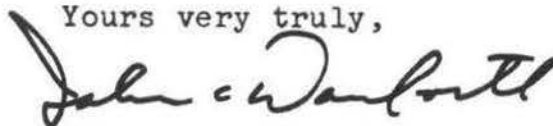
It is therefore the opinion of this office that:

(1) A person who wilfully and falsely executes a verification affidavit on a referendum petition may be punished therefor by a fine not exceeding \$500 or by imprisonment in the penitentiary not exceeding two years, or by both such fine and imprisonment.

(2) The Secretary of State is not under a statutory duty to forward such information as he might possess regarding the wilful and false execution of a verification affidavit on a referendum petition to appropriate prosecuting officials.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Warren K. Morgens.

Yours very truly,



JOHN C. DANFORTH
Attorney General

*Note amendments
to Ch. 105 in 1978*

CONFLICT OF INTEREST:
CITIES, TOWNS AND VILLAGES:
CITY CONTRACTS:
FIRE DEPARTMENTS:

A fourth class city fire chief who sells equipment and services to such city through a company owned in whole or in part by him violates Section 106.300, RSMo 1959, which

prohibits city officers from being directly or indirectly interested in city contracts.

OPINION NO. 44

February 18, 1970

Honorable Jack E. Gant
State Senator - 16th District
9517 East 29th Street
Independence, Missouri 64050



Dear Senator Gant:

This opinion is in response to your question stated as follows:

"Can the Fire Chief of the City of Lake Lotawana sell fire equipment and services to the City of Lake Lotawana from a company in which the Fire Chief holds a financial interest, if said company's bid is the low bidder."

This question requires consideration of two separate sections of our statutes. Section 105.490, RSMo Supp. 1967, of our conflict of interest law provides as follows:

"1. No officer or employee of an agency shall transact any business in his official capacity with any business entity of which he is an officer, agent or member or in which he owns a substantial interest; nor shall he make any personal investments in any enterprise which will create a substantial conflict between his private interest and the public interest; nor shall he or any firm or business entity of which he is an officer, agent or member, or the owner of substantial interest, sell any goods or services to any business entity which is licensed by or regulated in any manner by the agency in which the officer or employee serves.

"2. Any person who violates the provisions

Honorable Jack E. Gant

of this section shall be adjudged guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than five hundred dollars or by confinement for not more than one year, or both."

Also, Section 106.300, RSMo 1959, provides in full as follows:

"If any city officer shall be directly or indirectly interested in any contract under the city, or in any work done by the city, or in furnishing supplies for the city, or any of its institutions, he shall be deemed guilty of a misdemeanor; and any appointed officer becoming so interested shall be dismissed from office immediately by the mayor; and upon the mayor becoming satisfied that any elective officer is so interested, he shall immediately suspend such officer and report the facts to the council, whereupon the council, as soon as practicable, shall be convened to hear and determine the same; and if, by two-thirds vote of the council, he be found so interested, he shall be immediately dismissed from such office."

We are not aware of any attempt by the city to delegate authority to the fire chief to "transact business" for the city, and it is our view that he has no legal authority to transact any business in his capacity as fire chief within the meaning of the first sentence of Section 105.490. The government of such a city is in the mayor and the board of aldermen. The authority to enter into contracts is derived by ordinance. City of Unionville v. Martin, 95 Mo. App. 28, 68 S.W. 605 (1902).

Section 105.490 also prohibits such officer from making any personal investments "in any enterprise which will create a substantial conflict between his private interest and the public interest". Your question does not show any present relationship between the city and the enterprise in which the fire chief has a personal investment; and for that reason and because of the view expressed below, we do not now consider whether such a violation exists.

As can be seen by the quoted provisions of Section 106.300, city officers are prohibited from being directly or indirectly interested in any contract under the city; and there is no provision in Section 106.300 which excepts any city officer from the prohibition for the reason that he has no legal control over the

Honorable Jack E. Gant

making or entering into of the contract.

In determining whether or not the fire chief is a city officer, we note with respect to fourth class cities that Section 79.230, RSMo 1959, provides that the mayor with the consent and approval of the majority of the members of the board of aldermen has the power to appoint certain designated individuals including a street commissioner and night watchman and "such other officers as he may be authorized by ordinance to appoint."

Chapter 79 pertaining to fourth class cities does not contain a definition of officer. However, the St. Louis Court of Appeals in State v. Kelly, 103 Mo. App. 711, 77 S.W. 996 (1903), in interpreting and applying Section 106.300 cited authority stating that an officer is "one who is lawfully invested with an office" and that the test is that "it is a part of the administration of government" and that the term officer "includes all persons in any public station or employment conferred by the government".

It is therefore our view that the fire chief of a city of the fourth class is a city officer within the meaning of Section 106.300 and is prohibited from being directly or indirectly interested in any contract under the city. It is also our view that it makes no difference whether or not the contract represents the lowest bid obtainable.

The question of whether or not such officer is in fact "interested" is a question of fact. In this instance, we understand that the fire chief owns all or a major part of the business involved and, therefore, is unquestionably interested in the contract.

CONCLUSION

It is therefore the opinion of this office that a fourth class city fire chief who sells equipment and services to such city through a company owned in whole or in part by him violates Section 106.300, RSMo 1959, which prohibits city officers from being directly or indirectly interested in city contracts.

The foregoing opinion, which I hereby approve, was prepared by my assistant John C. Klaffenbach.

Very truly yours,



JOHN C. DANFORTH
Attorney General

Answer by letter-Bartlett

February 3, 1970

OPINION LETTER NO. 45

Mr. J. Warren Head, President
Missouri State Board of Education
Jefferson State Office Building
Jefferson City, Missouri 65101



Dear Mr. Head:

This letter is in response to your request for an opinion on two questions pertaining to the selection of a new Commissioner of Education by the State Board of Education. Specifically, your questions were as follows:

"We would like your advice and legal opinion as to whether or not the State Board of Education can, on the retirement of the present commissioner, employ an acting commissioner of education who has not resided in Missouri for at least one year immediately preceding his appointment, make him an acting commissioner, for a year, or until he meets that requirement, and later, if his services are satisfactory, make him the commissioner.

"We also wish your opinion as to whether or not the Board can contract with a commissioner of education to establish a definite term of employment."

I.

As you point out in your opinion request, Article IX, Section 2(b), Constitution of the State of Missouri provides in part that the State Board of Education:

Mr. J. Warren Head

" . . . shall select and appoint a commissioner of education as its chief administrative officer, who shall be a citizen and resident of the state, and removable at its discretion. . . ."

This provision does not require residence in the State of Missouri for any length of time. However, residency in the state for one year is added by Section 161.112, RSMo Supp. 1967:

"The state board of education shall appoint a commissioner of education as its chief administrative officer. The commissioner shall be a citizen who has resided in the state for at least one year immediately preceding his appointment and who possesses educational attainment and breadth of experience in the administration of public education. The board shall prescribe the duties of the commissioner and fix his compensation, and may remove him at its discretion."

Taking into consideration Article IX, Section 2(b) and Section 161.112, we believe that the State Board of Education could employ as Acting Commissioner of Education a man who has not resided in Missouri for at least one year immediately preceding his appointment. This conclusion is based on our Opinion No. 293 dated June 25, 1969, to the Honorable Robert A. Young. In this opinion we conclude that the Governor of the State of Missouri can designate a person to perform the duties of the office of the head of an executive department, such person not being appointed to the office or claiming title to the office. Furthermore, such person can perform the duties of the office until such time as the office is properly filled by a qualified person duly appointed. We see no meaningful distinction between the situation dealt with in Opinion No. 293 and the situation outlined in your opinion request. Therefore, insofar as Article IX, Section 2(b) and Section 161.112 are concerned, we believe that the State Board of Education could select a person to fill the position of Acting Commissioner of Education who had not resided in the state for at least one year immediately preceding his appointment.

Having reached this conclusion, we must now consider Article VII, Section 8 of the Constitution of Missouri which states as follows:

"No person shall be elected or appointed to any civil or military office in this state who is not a citizen of the United States, and who shall not have resided in this state one year next

Mr. J. Warren Head

preceding his election or appointment, except that the residence in this state shall not be necessary in cases of appointment to administrative positions requiring technical or specialized skill or knowledge."

It is not necessary for us to determine whether an Acting Commissioner of Education would be subject to the one year residency requirement in the first part of Section 8. If we assume that he would not be a public officer, then the provisions of Section 8 of Article VII would not apply to him. However, if it is assumed that he would be a public officer and therefore subject to Section 8, the exception contained in that section would apply, i.e., that residence in the state is not necessary in case of appointment to administrative positions requiring technical or specialized skill or knowledge. In Opinion No. 139 dated May 24, 1965, to Governor Hearnes, we held that the exception to Section 8 "was intended to include persons who might be chosen to administer and conduct the affairs of departments, agencies and institutions." The Acting Commissioner of Education would be a person chosen on a temporary basis to administer and conduct the affairs of the Department of Education. Therefore, he would be appointed to an administrative position which we believe requires technical or specialized skill or knowledge.

From the foregoing, we conclude that the State Board of Education could appoint a man as Acting Commissioner of Education even though this man had not resided in the State of Missouri for one year and, by so doing, would not violate the requirements of Section 2(b), Article IX, Section 161.112, RSMo Supp. 1967., or Section 8, Article VII of the Missouri Constitution.

II.

Article IX, Section 2(b) and Section 161.112, RSMo Supp. 1967, both state that the Commissioner of Education may be removed at the discretion of the State Board of Education.

"Discretion" as defined in Webster's International Dictionary (2nd Ed. 1950) is the "Power of free decision, individual judgment; undirected choice; . . ."

Freedom of decision based on one's ideas of what is proper under the circumstances appears to be an essential ingredient of discretion. See 27 C.J.S., Discretion, pp. 289-300 and State ex rel. and to Use of Kersey v. Pemiscot Land & Copperage Co., 317 Mo. 41, 295 S.W. 78, 80 (en banc 1927).

In Paquette v. City of Fall River, 278 Mass. 172, 179 N.E. 588 (1932), the court stated:

Mr. J. Warren Head

" . . . The plaintiffs were elected teachers under the terms of G. L. c. 71, § 41. It is there provided with respect to teachers in the positions of the plaintiffs that the 'school committee * * * in electing a teacher * * * who has served in its public schools for the three previous consecutive school years * * * shall employ him to serve at its discretion. * * *' The terms of this section are mandatory. The school committee has no option to elect the teachers there described except 'to serve at its discretion.' The meaning of this statutory language is that such discretion includes every essential element in the service thus established save as otherwise specified by statute. In this connection the discretion of the school committee denotes freedom to act according to honest judgment. *Corrigan v. School Committee of New Bedford*, 250 Mass. 334, 339, 145 N. E. 530. 'The term "discretion" implies the absence of a hard-and-fast rule. The establishment of a clearly defined rule of action would be the end of discretion, and yet discretion should not be a word for arbitrary will or inconsiderate action. "Discretion means the equitable decision of what is just and proper under the circumstances."' *The Styria v. Morgan*, 186 U. S. 1, 9, 22 S. Ct. 731, 734, 46 L. Ed. 1027. . . ." Id. at 590.

In view of the foregoing definitions of "discretion," we believe that the State Board of Education cannot make a decision under today's circumstances which will prevent it from taking different action under changed circumstances. The State Board of Education must retain the freedom of action expressly granted to it by the Missouri Constitution and Section 161.112 to have the Commissioner "removable at its discretion."

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 293
6-25-69, Young

Op. No. 139
5-24-65, Hearnese

CONSERVATION COMMISSION:
ARRESTS:
TRESPASS:

1. In order for information obtained from an alleged violator of conservation rules during "custodial interrogation" to be used against that person

to support a conviction, the accused must first be informed of his Fifth Amendment rights in accordance with the guidelines set forth by the United States Supreme Court in the Miranda case. 2. A conservation agent acting in the performance of his duties will not be guilty of trespass by reason of his entering the lands of private persons; an agent is "within the performance of his duties" in entering the lands of private persons only if he has reason to suspect violation of fish and game laws. 3. A person accused of a game violation is not necessarily entitled to a written summons or complaint at that immediate time. 4. A person is not required to produce identification other than the production of a fishing or hunting license to an agent of the Conservation Commission.

September 30, 1970

OPINION NO. 46

Honorable Ray S. James
Representative - 5th District
6421 Brookside Road
Kansas City, Missouri 64113



Dear Representative James:

This letter is in response to your request for an opinion of this office concerning the rights and duties of conservation agents and alleged violators of conservation laws.

This request asks the following questions;

1. "Must violators of the rules of the Conservation Commission be accorded the rights of defendant and be advised of their rights before interrogation by conservation officers?"

You also inquire:

"Is not one accused by a conservation agent entitled to the same rights and privileges as any citizen, i.e., Miranda warning?"

2. "Does a conservation agent have 'an inherent right to trespass at times other than when he

has personally observed a misdeameanor (sic)?"

3. "Following an arrest for a game violation, is not the accused entitled to a written summons and/or complaint at that immediate time?"

4. "Is there statutory, or any other, authority for a conservation agent to demand a hunter's identification beyond the production of a hunting or fishing license?"

1.

"Must violators of the rules of the Conservation Commission be accorded the rights of defendant and be advised of their rights before interrogation by conservation officers?"

Rules of the Conservation Commission are accorded the weight and force of statutes, and any person violating any of such rules and regulations relating to wildlife shall be guilty of a misdemeanor by virtue of Section 252.230, RSMo 1969. The question you present is, then, does the requirement set forth by the United States Supreme Court in the decision of *Miranda v. Arizona*, 384 U.S.436, require that a person who commits a misdemeanor be informed of his rights before interrogation by conservation agents.

An analysis of the decision in the *Miranda* case reveals that the critical point in time at which the accused must be advised of his rights is when "custodial interrogation begins." Although determination as to the inception of "custodial interrogation" can be made only upon the facts and circumstances of a particular case, it is sufficient for our purpose to define "custodial interrogation" as questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. *Miranda v. Arizona*, supra.

Under *Miranda*, police authorities are required to follow scrupulously each and all of the four specific procedural safeguards or rights the court delineates as Fifth Amendment rights of an individual in custody or otherwise deprived of his freedom. The specific warning requires that the individual be informed that: (1) He has the right to remain silent. (2) Anything he says can and will be used against him in a court of law. (3) He has the right to talk to a lawyer and have the lawyer present with him while he is being questioned. (4) If he cannot afford to hire a lawyer, one will be appointed to represent him before any questioning, if he wishes one.

To insure the enforcement of these rights, the court further said:

" . . . But unless and until such warnings
. . . are demonstrated by the prosecution at

Honorable Ray S. James

trial, no evidence obtained as a result of interrogation can be used against him."
Miranda v. Arizona, supra, 1.c.479.

Failure to give the specific warnings does not exonerate the violator, but does compel the exclusion of any information obtained during "custodial interrogation" at the trial of the accused.

The Fifth Amendment privilege against self-incrimination is protected under the Fourteenth Amendment against abridgement by the states. Malloy v. Hogan, 1964, 378 U.S.1. The Supreme Court of the United States has not limited this constitutional right in regard to the grade of the offense or the degree of punishment, and it is logical to assume that this right would apply to those accused of misdemeanors as well as felonies.

The Supreme Court of Missouri has made the following observations:

" . . . we do not readily see why the requisites of due process should vary according to the severity of the permissible punishment. . . . "
State v. Glenn, 317 S.W.2d 403,407.

" . . . we see no readily apparent reason why the minimum standard for due process of law should depend upon the permissible punishment. . . . "
State v. Warren, 321 S.W.2d 705,709.

The question of whether a conservation agent is a "peace officer" has been resolved in the affirmative by this office in Attorney General Opinion No. 189, 1966, issued to Harold S. Hutchinson, copy enclosed.

The duties imposed upon a conservation agent by law are (Section 252.080, RSMo 1969) that he shall arrest:

" . . . any person caught by him or in his view violating or who he has good reason to believe is violating, or has violated this law or any such rules and regulations , and take such person forthwith before a magistrate or any court having jurisdiction, who shall proceed without delay to hear, try and determine the matter as in other criminal cases."

Also under Section 252.080, RSMo 1969, conservation agents are given the same power to serve criminal process as sheriffs and marshalls in connection with violations of the conservation laws.

It is our opinion, therefore, that in order for information obtained from an alleged violator of conservation rules during "custodial interrogation" to be used against that person to support a conviction, the accused must first be informed of his Fifth Amendment

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rights in accordance with the guidelines set forth by the United States Supreme Court in the Miranda case.

2.

"Does a conservation agent have 'an inherent right' to trespass at times other than when he has personally observed a misdemeanor?"

A conservation agent has no "inherent right" to trespass as such, but he is given the same powers as other law enforcement authorities insofar as he is within the scope of performance of his duties relating to the enforcement of conservation laws. The law is well settled that an officer of the law, acting in the performance of his duties, will not be guilty of trespass by reason of his entering the lands of private persons (52 Am.Jur., Trespass, Section 41, P.868; 87 C.J.S., Trespass, Section 54, Page 1006). See Attorney General Opinion No. 87, Swenson, March 21, 1949, copy enclosed. He may, of course, become guilty of trespass by acting in excess of his authority. The question now presented is "when is a conservation agent acting in the performance of his duties?" Can an agent of the Conservation Commission go onto private lands as a matter of course, or must he have reason to suspect a violation of the laws he is employed to enforce?

It is the opinion of this office that an agent is "within the performance of his duties" in entering the lands of private persons only if he has reason to suspect a violation of fish and game laws. Agents of the Conservation Commission are the persons primarily charged with the duty of enforcing the statutory laws relating to fish and game and the rules and regulations of the Conservation Commission relating thereto. Section 252.100, RSMo 1969, authorizes them to make complaints and cause proceedings to be commenced against any person for the violation of fish and game laws; to search without a warrant any creel, container, game bag, hunting coat or boat in which he has reason to believe wildlife is being unlawfully possessed or concealed; and, upon the issuance of a search warrant, to enter and search an occupied building and outbuildings immediately adjacent thereto, cold storage locker plants, motor vehicle, or sealed freight or express car for such purposes and then only in the daytime. It is further provided that interfering with such agent's activity in this regard constitutes a misdemeanor. Section 252.080, RSMo, authorizes an agent to serve criminal process in cases of violation of fish and game laws, and to arrest without a warrant "any person caught by him or in his view violating or who he has good reason to believe is violating, or has violated this law or any such rules and regulations."

We believe that an agent would be within the performance of his duty if he were engaged in any of the activity referred to in the above paragraph. There is no requirement that a search warrant be obtained prior to his entering an open field while carrying out the above duties. Numerous cases have upheld the right of other law enforcement officers to search such premises without a warrant in the enforcement of liquor laws (State v. Cobb, 309 Mo.89, 273 S.W.736; State v. Dailey, 280 S.W.1044, Ann.74 A.L.R.1454). There would appear

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to be no reason for applying a different rule to officers enforcing fish and game laws. However, in the above referenced cases, the law enforcement officer had reason to suspect a violation of the laws. It seems to us an entirely different situation where an officer has no reason to suspect a violation when he enters the private lands of another. This type of activity seems to be a type of administrative regulation, and there is no expressed statutory authority for agents to engage in this type of regulation in relation to fish and game laws.

On the question of a search over land, without a warrant, we must predicate our approach upon the terms of the Fourth Amendment and the Fourteenth Amendment of the United States Constitution (which makes the fourth application to states), and Article I, Section 15, of the Missouri Constitution, 1945. Comparison of the Fourth Amendment and Article I, Section 15, reveals that they are virtually identical in pertinent parts. In *Mapp v. Ohio*, 367 U.S.643, 81 S.Ct.1684, 6 L.Ed. 2d 1081 (1961), the United States Supreme Court held that the exclusionary rules governing evidence obtained by searches and seizures in violation of the Fourth Amendment to the United States Constitution, was applied to the state through the due process clause of the Fourteenth Amendment. Thus, the Supreme Court held that the evidence illegally seized by a state officer is inadmissible in a state criminal trial, just as it is in a federal criminal trial. See Annotation in 6 L.Ed.2d 1544.

The United States Supreme Court in *Ker v. California*, 374 U.S. 23, 83 S.Ct.1623, 10 L.Ed 2d 726, elaborated further on the Fourth Amendment and stated that while states were not precluded from developing their own rules governing searches and seizures, they must at all times remain within the federal constitutional guarantee.

Inasmuch as the operation of the Conservation Commission is administrative in nature and constitutional in origin, we note that the United States Supreme Court in *Camara v. Municipal Court of San Francisco*, 387 U.S.523, 87 S.Ct.1727, 18 L.Ed.2d 930, and *See v. City of Seattle*, 387 U.S.541, 87 S.Ct.1737, 18 L.Ed.2d 943, held that warrants were necessary in searches of an administrative character, which we think is pertinent here. The *Camara* case involved a housing inspector who attempted to enter appellant's building for inspection purposes pursuant to authority of the San Francisco Housing Code. The *See* case involved an inspection under the Fire Inspection Ordinance. We note parenthetically they did not declare administrative searches invalid, but merely that they be made in accordance with existing law. Since the legislature has not expressly authorized conservation agents to enter private lands for purposes of enforcing administrative regulations of fish and game laws when there is no reason to suspect violation, we do not believe such agents possess such authority under existing law.

In several instances, the legislature has granted statutory authority to enter the private lands of another. Section 277.120(13), RSMo 1969, provides:

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" . . . The state highway commission also shall have the same authority to enter upon private lands to survey and determine the most advantageous route of any state highway as granted, under section 388.210, RSMo, to railroad corporations."

Section 388.210, RSMo 1969, referred to in the foregoing statute, reads, in part:

"Every corporation formed under this chapter shall, in addition to the powers herein conferred, have power:

"(1) To cause such examination and survey for its proposed railroad to be made as may be necessary to the selection of the most advantageous route, and for such purpose, by its officers, agents or servants, to enter upon the lands or waters of any person; but such corporation shall be liable and subject to responsibility for all damages which shall be done thereto;"

The legislature, by virtue of Section 254.250, RSMo 1969, has given conservation agents express authority to enter upon any lands at any time for the purpose of carrying out the provisions of Chapter 254, the State Forestry Law. It seems to us that had the legislature intended to give agents the same powers in respect to fish and game laws, it would have done so.

The Missouri Supreme Court has defined trespass as every unauthorized entry, regardless of degree of force used, even if no damage is done, or the injury is slight. *Mawson v. Vess Beverage Co.*, 173 S.W.2d 606 (Mo.1943).

Section 560.445, RSMo 1969, provides that wilful entry upon the enclosed premises of another, when the owner of such premises has posted plainly written signs or warnings, is deemed a misdemeanor. That a conservation agent is acting in performance of his duty because he has reason to suspect a violation of fish and game laws would be a defense to an action in either civil or criminal trespass.

In conclusion, it is the opinion of this office that unless a conservation agent has reason to suspect a violation of the conservation laws, he is not "within the performance of his duty" as to make him immune from trespass when he enters the private lands of another.

3.

"Following an arrest for a game violation, is not the accused entitled to a written summons and/or complaint at that immediate time?"

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An arrest for violation of the Fish and Game Statute or rules and regulations relating thereto may be made in either of two ways, with or without a warrant.

The procedure for an arrest with a warrant is set forth in Supreme Court Rules 21.03 through 21.06, derived from Sections 543.020, 543.030 and 543.050, RSMo 1969. These rules provide that the prosecuting attorney of a county in which an offense may be prosecuted may make an information charging the commission of a misdemeanor either upon his own knowledge or upon the basis of a complaint previously submitted to him. Such information is to be filed in any court having jurisdiction to try the offense charged. Upon the filing of an information charging the commission of a misdemeanor, a warrant for the arrest of the defendant shall be issued. If, however, there is reasonable ground, in the discretion of the judge, magistrate or prosecuting attorney as the case may be, to believe that the defendant will appear upon a summons, a summons shall be issued instead of a warrant of arrest. The summons shall describe the offense charged in the information and shall command the defendant to appear at a stated time and place in answer thereto. If the defendant shall fail to appear as commanded by the summons, a warrant of arrest shall be issued.

In addition to the above procedure, the Rules provide that a complaint of the commission of a misdemeanor, verified by oath or affirmation, may be filed with the magistrate having jurisdiction of the offense and if the magistrate is satisfied that the accused is about to escape, or has no known place of permanent residence or property in the county likely to restrain him from leaving for the offense charged, he shall immediately issue a warrant and have the accused arrested and held until the prosecuting attorney shall have time to file an information. Any warrant issued upon a complaint or information charging the commission of a misdemeanor shall describe the offense charged. The warrant shall be executed by the arrest of the accused. The officer need not have the warrant in his possession at the time of the arrest, but upon request he shall show the warrant to the accused as soon as possible. Section 532.630, RSMo 1969, provides that failure to give a prisoner a copy of the process within six hours is a misdemeanor and that the person committing said misdemeanor shall also forfeit to the party aggrieved five hundred dollars.

In addition to the above procedures, a conservation agent is given the power of arrest without warrant under certain conditions by virtue of Section 252.080, RSMo 1969, which states so far as is pertinent that:

" . . . Any such agent may arrest, without warrant, any person caught by him or in his view violating or who he has good reason to believe is violating, or has violated this law or any such rules and regulations, and take such person forthwith before a magistrate or any court having jurisdiction, who shall proceed without delay to hear, try and determine the matter as in other criminal cases."

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The specified conditions are generally the same conditions under which any officer may arrest without warrant; that is, when probable cause exists. Section 544.170, RSMo 1969, specifies the maximum time which a person can be held without a warrant as 20 hours:

"All persons arrested and confined in any jail, calaboose or other place of confinement by any peace officer, without warrant or other process, for any alleged breach of the peace or other criminal offense, or on suspicion thereof, shall be discharged from said custody within twenty hours from the time of such arrest, unless they shall be charged with a criminal offense by the oath of some credible person, and be held by warrant to answer to such offense; and every such person shall, while so confined, be permitted at all reasonable hours during the day to consult with counsel or other persons in his behalf; and any person or officer who shall violate the provisions of this section, by refusing to release any person who shall be entitled to such release, or by refusing to permit him to see and consult with counsel or other persons, or who shall transfer any such prisoner to the custody or control of another, or to another place, or prefer against such person a false charge, with intent to avoid the provisions of this section, shall be deemed guilty of a misdemeanor."

It may be well to note here that the "courtesy summons" often issued at the time a conservation agent observes what he believes to be a violation does not constitute an arrest. Generally, if a person fails to appear at the time and place specified in the "courtesy summons", a complaint is filed and a warrant is issued as described above.

For the reasons noted in the above explanation of the two methods of arrest, it is the opinion of this office that a person accused of a game violation is not entitled to a written summons or complaint at that immediate time.

4.

"Is there statutory, or any other, authority for a conservation agent to demand a hunter's identification beyond the production of a hunting or fishing license?"

The only identification which the fish and game law requires to be exhibited upon demand is the license or permit to hunt or fish. Section 252.060, RSMo 1969, states:

"It is hereby declared to be the duty of every person holding a license or permit issued pur-

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suant to any such rules and regulations to submit the same for inspection by any agent of the commission, or by any sheriff, marshal or constable or any deputy thereof. Any person holding such license or permit and refusing to submit the same when a proper demand is made therefor shall be deemed guilty of a misdemeanor."

This statute provides that the demand may be made by certain persons other than agents of the commission, and Section 252.070, RSMo 1969, expressly states that it is the duty of these other persons to enforce the fish and game laws.

It may be noted that Section 302.181, RSMo 1969, requires the holder of a driver's license, upon demand, to exhibit it to "any officer of the highway patrol, or any police officer or peace officer, or any other duly authorized person." (Emphasis added). If "any other duly authorized person" includes conservation agents, then it would appear that there is some basis for requiring identification beyond the hunting or fishing license. This section seems to be limited, however, to persons driving a motor vehicle. Therefore, if a conservation agent qualified as "any other duly authorized person", he could require production of the driver's license if the person were driving an automobile but not if he stopped him in the field. In addition, we feel that it is questionable that an agent of the Conservation Commission would qualify as a duly authorized person in light of the fact that the legislature, by virtue of Section 252.080, RSMo 1969, which gives agents the same power as sheriffs and marshals "only in such cases as are violations of this law and rules and regulations of the commission". We can dispose of the question without answering it by assuming that your question does not involve a person who is operating a motor vehicle.

For the reason that there is little or no case law relating to the statute requiring production of a fishing or hunting license other than to uphold its constitutional validity (see State v. Bennett, 288 S.W.50 (Mo.1926), it may be helpful to examine the prevailing law relating to drivers' licenses since the two types of statutes are similar in nature.

The prevailing case law relating to statutes requiring the display upon demand of a driver's license indicates that authorization to demand production of such identification is limited to acts connected with the enforcement of motor vehicle laws, and that to demand production of such identification for any other reason is unauthorized as it would be the equivalent of obtaining information by subterfuge (See 60 C.J.S., Motor Vehicles, Section 157, page 808).

We can see no reason why this rule would not also apply to the statute requiring display upon demand of a hunting or fishing license.

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There is case law in other states holding that a traffic officer is not authorized to demand production of a driver's license if all he wants to know is who a person is, where he is going, and where he has been, because such information was not related to the licensing requirement. See 61A,C.J.S.,Motor Vehicles, Section 593(2),page 284; People v. Harr, 235 N.E.2d 1 (Ill.1968).

We can find no authority to the proposition that a law enforcement official is authorized to demand the production of identification of any form when no specific statute exists giving him such authority. To the contrary, there is case law to the effect that a person has a right to refuse to identify himself to an officer and was guilty of no offense in doing so when no statute existed making such action an offense. See 61A,C.J.S.,Motor Vehicles,Section 652,page 447; People v. Grange, 190 N.Y.S.573 (1921).

Further, it has been held that where a statute requires a person to produce a certain type of identification but sets no penalty for the refusal to do so, then it is not a criminal offense to refuse to do so and, therefore, cannot be punished for his action. See State v. Farren, 140 Ohio St.473, 45 N.E.2d 413,143 A.L.R.1016 (1942). It may be noted here that violation of either Missouri statute requiring the display upon demand of a license is deemed by statute to be a misdemeanor.

It is, therefore, the conclusion of this office that a person is not required to produce identification other than the production of a fishing or hunting license to an agent of the Conservation Commission.

This conclusion does not, of course, preclude a conservation agent from making a reasonable effort to ascertain the identity of any person he suspects to be violating the fish and game laws, or to arrest anyone who he suspects to possess a fishing or hunting permit other than his own in violation of Rule 2.15 of the Wildlife Code of Missouri.

For your information, a copy of the Fish and Game Statute, the Wildlife Code, and Attorney General Opinion No. 464, issued to Ralph B. Nevins, December 6, 1963, are enclosed.

CONCLUSION

For the foregoing reasons, it is the opinion of this office that:

1. In order for information obtained from an alleged violator of conservation rules during "custodial interrogation" to be used against that person to support a conviction, the accused must first be informed of his Fifth Amendment rights in accordance with the guidelines set forth by the United States Supreme Court in the Miranda case.

2. A conservation agent acting in the performance of his duties will not be guilty of trespass by reason of his entering the lands of private persons; an agent is "within the performance of his duties" in

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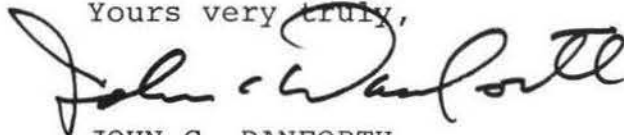
entering the lands of private persons only if he has reason to suspect a violation of fish and game laws.

3. A person accused of a game violation is not necessarily entitled to a written summons or complaint at that immediate time.

4. A person is not required to produce identification other than the production of a fishing or hunting license to an agent of the Conservation Commission.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Walter W. Nowotny, Jr.

Yours very truly,

A handwritten signature in black ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a stylized "D".

JOHN C. DANFORTH
Attorney General

Enclosures:

OP.189-1966-Hutchinson
OP 87 -1949-Swenson
OP 464-1963-Nevins
Fish & Game Statute
Wildlife Code

TAXATION (INHERITANCE):

In the situation where a life estate is given to A with a vested remainder in B if B survives A but if not a contingent remainder in C, and if the tax rate is the same for B and C, then inheritance tax under Chapter 145, RSMo, should be taxed as a life estate against A and the remainder against B.

August 18, 1970

OPINION NO. 51

Honorable James E. Schaffner
Director of Revenue
Department of Revenue
Jefferson Building
Jefferson City, Missouri 65101



Dear Mr. Schaffner:

This is in reply to your request for an official opinion from this office concerning the inheritance tax that should be collected in the following situation:

"The decedent died on the 18th day of March, 1969. In her will she left her house, which is valued at \$7,500.00, in the following manner:

(a) A life estate to her sister, Frieda, who was born January 10, 1898.

(b) Then to John, the decedent's nephew, who was born November 22, 1921, if he survives Frieda.

(c) To Gerry, daughter of the decedent's nephew, who was born April 1, 1952, if John fails to survive Frieda."

There is no question that there is an inheritance tax due. See Section 145.020, RSMo 1969. The question is the proper computation in this situation.

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Section 145.200, RSMo 1969, provides the formula to be used in the valuation of life estates and remainders, and reads in part as follows:

"When any property, interest therein or income therefrom belonging to any estate in course of administration, shall pass or be limited for the life of another or for a term of years, or to terminate on expiration of a certain period, the value of property at the date of death so passing shall be determined by appraisal for the purpose of taxes under this chapter immediately after the death of the decedent and the value of said life estate, term of years or period of limitation, shall be valued according to mortality tables, using the interest rate or income rate of five per cent, and the value of the remainder in said property so limited shall be ascertained by deducting the value of the life estate, term of years, or period of limitation from the clear market value of the property so limited and the tax on the transfer of the separate estate or estates, remainder or remainders or interest shall be immediately due and payable, to the director of revenue together with interest thereon and said tax shall accrue as provided in section 145.110 and remain a lien upon the entire property until paid; * * * "

See also Section 145.220, RSMo 1969, which provides for mortality tables to be determined by the Superintendent of Insurance.

It is clear that Frieda takes a life estate under the will. The computation turns on what interest, if any, John and Gerry take.

Section 474.480, RSMo 1969, provides:

"In all devises of lands or other estate in this state, in which the words 'heirs and assigns', or 'heirs and assigns forever', are omitted, and no expressions are contained in the will whereby it appears that the devise was intended to convey an estate for life only, and no further devise is made of the devised premises, to take effect after the death of the devisee to whom the same is given, it shall be understood to be the intention of the testator thereby to devise an absolute estate in the same, and the devise conveys an estate in fee simple to the devisee, for all of the devised premises."

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The language of the instant devise has omitted the any words of limitation referred to in the above section. Therefore, John and Gerry take, if at all, a fee simple.

It is clear that Gerry takes a contingent remainder under the will since her interest will become possessory only on the happening of a condition precedent; i.e., John's failure to survive Frieda.

To determine John's interest we must look to certain rules of construction set out by the Missouri courts governing the determination of the testator's intention. The primary rule is that the law favors the vesting of testamentary gifts or legacies at the earliest possible date, unless a contrary intention is manifested clearly. While there is doubt as to the nature of the legacy or interest, it will be construed as vested rather than contingent. *St. Louis Union Trust Co. v. Herf*, 361 Mo. 548, 235 S.W.2d 241. It is further stated in *Deacon v. St. Louis Union Trust Co.*, 271 Mo. 669, 197 S.W.2d 1, l.c. 265, " . . . wherever it is possible, an instrument will be so construed as not creating an estate subject to a condition, particularly a condition precedent. . . . "

In *Uphaus v. Uphaus*, 315 S.W. 2d 801, (Mo.1958) l.c. 803, the court held that, after devising a life estate to testator's son, the words, " . . . at the death of my said son . . . there shall be paid to his wife, . . . if she shall survive him, the sum of three thousand dollars (\$3000.00) out of said real estate . . . and the remainder . . . shall go to and descend equally to the rest of my children . . . , " created a vested remainder in the other children.

In *Henderson v. Calhoun*, 183 S. W. 584 (Mo.1916), the court held that a bequest to three brothers and sisters with the words, " . . . and if any of them die without issue their portion to revert to their brothers and sisters . . . ", l.c. 584, created a vested remainder in each of the brothers and sisters subject to divestment if they "die without issue."

The words in the instant will are not such as to clearly manifest an intention to create a contingent remainder and, further, it is possible to construe the words as creating a vested remainder subject to divestment. Therefore, John takes a vested remainder in fee, subject to divestment, and Gerry takes a contingent remainder.

Subsection 2 of Section 145.240, RSMo 1969, provides for the computation of tax in the case of contingent expectancies, and reads as follows:

"2. When the property is transferred in trust or otherwise, and the rights, interest or estates of the transferees are wholly dependable upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed

Honorable James E. Schaffner

upon said transfer at the lowest rate which, on the happening of any of said contingencies or conditions transferring property to a natural person, would be possible under the provisions of this chapter, and such tax so imposed shall be due and payable forthwith by the executor, administrator, or trustee out of the property transferred; . . . "

Clearly both the vested remainder subject to divestment and the contingent remainder fall within the above section. Thus the tax is assessed at the lowest possible rate which is the same for both John and Gerry (three per cent) according to subdivision 2 of subsection 1 of Section 145.060, RSMo 1969.

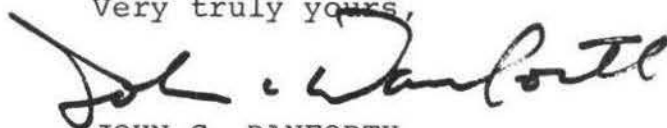
Therefore, since John's interest is vested, and since the tax rate is the same for both John and Gerry, the entire remainder interest should be taxed against John.

CONCLUSION

It is the opinion of this office that in the situation where a life estate is given to A with a vested remainder in B if B survives A but if not a contingent remainder in C, and if the tax rate is the same for B and C, then inheritance tax under Chapter 145, RSMo, should be taxed as a life estate against A and the remainder against B.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Walter W. Nowotny, Jr.

Very truly yours,

A handwritten signature in black ink, appearing to read "John C. Danforth", written over a horizontal line.

JOHN C. DANFORTH
Attorney General

INSURANCE:

MUTUAL INSURANCE COMPANIES:

County mutual insurance companies that have elected to accept the provisions of Sections 380.580 to 380.840, RSMo 1959 are subject to the provisions of

Sections 379.810 to 379.880 V.A.M.S. and that town mutual insurance companies under 380.280 to 380.470, RSMo 1959, and farmers mutual insurance companies organized operating under Sections 380.580 to 380.840, RSMo 1959, are not subject to and cannot become subject to Sections 379.810 to 379.880, V.A.M.S.

OPINION NO. 52

March 19, 1970

Mr. William Y. McCaskill
Superintendent
Division of Insurance
Department of Business and
Administration
100 East Capitol
Jefferson City, Missouri 65101



Dear Mr. McCaskill:

This opinion is in response to a request from your office dated November 10, 1969, asking whether county mutual insurance companies, town mutual insurance companies and farmers mutual insurance companies are subject to the provisions of Section 379.131, House Bill No. 772 Seventy-fifth General Assembly.

The provisions of such bill have been renumbered by the revision of statutes. Section 379.810 reads in part as follows:

"1. There is hereby established the Missouri Basic Property Insurance Inspection and Placement Program, hereinafter referred to as 'Program', to make available basic property insurance to persons having property interests in this state who are in good faith entitled to but who are unable to procure such coverage through ordinary methods. Such Program shall provide for the eq-

Mr. William Y. McCaskill

uitable distribution and placement of risks among all insurers in the manner and subject to the conditions hereinafter stated.

Section 379.815 V.A.M.S. reads in part as follows:

"As used in this section the following terms mean:

"(1) 'Insurer' means any insurance company, reciprocal or interinsurance exchange or other organization licensed and authorized by the superintendent to write property insurance, including the property insurance components of multi-peril policies, on a direct basis, in this state."

The specific question is whether the term used in Section 379.815, subsection (1) "any insurance company" includes companies organized under Chapter 380.

In rendering this opinion, it will be necessary to deal with several subquestions. The first subquestion presented is as follows:

Are county mutual insurance companies accepting the provisions of 380.580 to 380.840, .RS.Mo., 1959, subject to 379.810 to 379.880, R.S.Mo., 1969, and included in the definition of 'Insurer'?

County mutual insurance companies prior to August 29, 1953, were organized under Section 380.010 to 380.270. A county mutual insurance company organized and continuing to operate under those sections was exempted from the operation of all other general insurance statutes by Section 380.060. In 1953, Section 380.009 was enacted and reads as follows:

"No county mutual insurance company shall hereafter be organized or incorporated under the provisions of sections 380.040 to 380.270, but nothing in this section shall be construed as restricting or abridging in any manner the right of any county mutual insurance company now incorporated and licensed to do business in this state from continuing to do

Mr. William Y. McCaskill

business under the provisions of sections 380.040 to 380.270."

At the same time, the legislature enacted Section 380.600, which allows a county mutual organized under the provisions of Sections 380.040 to 380.270 to avail itself of the rights, powers and privileges and immunities conferred by Sections 380.580 to 380.840, and this section states when the company avails itself of these provisions, such company shall be fully subject to and governed by Sections 380.580 to 380.840. It seems clear that the legislature thus intended to provide that county mutuals electing to come under the provisions of Sections 380.580 to 380.840 would be governed by those sections.

Sections 380.580 to 380.840 do not provide that county mutual insurance companies shall be exempt from all other provisions of the insurance laws of this state. As a result, it is the opinion of this office that county mutual insurance companies that have elected to accept the provisions of 380.580 to 380.840 are in fact subject to Sections 379.810 to 379.880 V.A.M.S.

Subquestion two is as follows:

Are town mutual insurance companies under 380.280 to 380.470, R.S.Mo., 1959, subject to Sections 379.810 to 379.880 V.A.M.S. and included in the definition of 'Insurer'?

Town mutuals were not given the opportunity to elect to come under the provisions of Sections 380.580 to 380.840 and as a consequence, town mutual insurance companies are governed by Sections 380.280 to 380.470. Section 380.290, RSMo 1939 reads as follows:

"All town mutual fire and lightning, tornado, windstorm or cyclone insurance companies organized for the sole purpose of mutually insuring the property of its members against any loss incurred by them from fire, lightning or windstorm as may be provided by its constitution and bylaws, and not inconsistent with the provisions of sections 380.280 to 380.470, shall be exempt from all laws of this state governing other insurance companies, except that such companies shall comply with sections 148.310, 379.185 and 379.190, RSMo."

In State ex rel Brotherhood of American Yeomen v. Reynolds,

Mr. William Y. McCaskill

229. S.W. 1057, (Mo. En Banc 1921), the question was whether as a prerequisite to the right of the defendant insurance company to interpose the defense of misrepresentation it must return the premiums received from plaintiff? The defendant insurance company was a fraternal beneficiary association and in part governed by Section 5, Laws 1911, pp. 285; Section 641, RS 1919 which reads as follows:

"'Except as herein provided, such societies shall be governed by this act and shall be exempt from all provisions of the insurance laws of this state, not only in governmental relations with the state, but for every other purpose, and no law hereafter enacted shall apply to them, unless they be expressly designated therein.'"

Under the general insurance laws, it was provided that in suits brought upon life policies a defense based on misrepresentation would not be valid unless the defendant deposited in the court the benefits received on such policies. The court held that this general section did not apply to defendant and stated l.c. 1058 as follows:

"The language of this section is such that it would be difficult to employ words more comprehensive of the legislative purpose to exempt this class of associations from the provisions of the general insurance law, and to restrict their operations to the statute of their creation. In harmony, therefore, with the rules of construction which, in our opinion, are in accord with right reasoning, there is no escape from this conclusion. . . ."

I think it is clear that the legislature by enacting 380.290 intended to exempt town mutual insurance companies from the general insurance law and in accord with the reasoning in State v. Reynolds, supra, it is the opinion of this office that town mutual insurance companies are not subject to Sections 379.810 to 379.880.

Subquestion three is as follows:

Are farmers mutual insurance companies organized under Section 380.590, R.S.Mo., 1959, or accepting the provisions of 380.580 to 380.840, R.S.Mo., 1959, subject to Sections 379.810 to 379.880 and included in the definition of 'Insurer'?

Mr. William Y. McCaskill

Section 380.800 RSMo 1953 provides as follows:

"Any farmers' mutual insurance company organized or operating under sections 380.580 to 380.840 shall be exempt from all provisions of other insurance laws of this state, not only in governmental relations but for every other purpose. No law hereafter passed shall apply to any farmers' mutual insurance company unless such law shall expressly declare that it is applicable to such farmers' mutual insurance companies."

This statute is inclusive of companies organized under Section 380.590 and companies availing themselves of the provisions of Sections 380.580 to 380.840. Under the authority of *State v. Reynolds, supra*, it is the opinion of this office that farmers mutual insurance companies organized or operating under Sections 380.580 to 380.840 are not subject to Sections 379.810 to 379.880 V.A.M.S.

Subsection four is as follows:

If in the event Sections 380.290 and 380.800 exempt said companies or such companies are otherwise not subject to Sections 379.810 to 379.880, may they voluntarily become subject to said sections?

In *State v. Reynolds supra*, the court held that companies made exempt from the general insurance laws must restrict their operations to the statute of their creation. It is therefore the opinion of this office that those companies which are exempted from Sections 379.810 to 379.880 V.A.M.S. are also prohibited from voluntarily accepting the provisions of Sections 379.810 to 379.880.

CONCLUSION

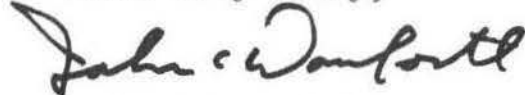
It is the opinion of this office that county mutual insurance companies that have elected to accept the provisions of Sections 380.580 to 380.840, RSMo 1959 are subject to the provisions of Sections 379.810 to 379.880 V.A.M.S. and that town mutual insurance companies under 380.280 to 380.470 RSMo 1959 and farmers mutual

Mr. William Y. McCaskill

insurance companies organized or operating under Sections 380.580 to 380.840, RSMo 1959, are not subject to and cannot become subject to Sections 379.810 to 379.880 V.A.M.S.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Alfred C. Sikes.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is written in a cursive style with a large, prominent initial "J".

JOHN C. DANFORTH
Attorney General

SCHOOLS:
SCHOOL FUNDS:

A six-director school district in Missouri is not authorized to pledge net revenues received as tuition from persons attending a vocational school operated by the school district as security for the payment of the principal and interest on revenue bonds issued by the district pursuant to Section 164.231, RSMo Supp. 1967, as amended, to finance the cost of constructing a dormitory to be used to house persons attending such vocational school.

OPINION NO. 55

March 24, 1970

Honorable C. M. Bassman
State Representative
One hundred sixth District
9th and Gutenberg
Hermann, Missouri 65041



Dear Representative Bassman:

This opinion is issued in response to your request for an official ruling of this office on the following question:

"Does a six director School District in Missouri have authority to pledge the net revenues received as tuition from persons attending a vocational school operated by the School District as security for the payment of the principal and interest on revenue bonds issued by the District under Section 164.231 RSMo Supp. 1967, as amended, to finance the cost of constructing a dormitory to be used to house persons attending such vocational school?"

You give the following factual background in your opinion request:

"The Reorganized School District No. R-II of Osage County, Missouri is planning to

Honorable C. M. Bassman

construct a dormitory to house persons who attend the Vocational School which is operated by the District at Linn, Missouri. The District intends to finance the cost of constructing the dormitory by the issuance of revenue bonds pursuant to Section 164.231 RSMo. Supp. 1967, as amended by House Bill No. 90 passed during the regular session of the 75th General Assembly.

"A question has arisen as to whether the District has authority under House Bill No. 90, referred to above, to pledge monies received as tuition from persons attending the Vocational School, as well as the net revenue arising from the operation of the dormitory, as security for the payment of the principal of and interest on revenue bonds issued to finance the cost of constructing the dormitory."

Section 164.231, RSMo 1967 Supp., as amended by House Bill 90, Seventy-Fifth General Assembly (see Section 164.231 V.A.M.S. (1969-70 Supp.)) provides:

"For the purpose of providing funds for the acquisition, construction, erection, equipment and furnishing of dormitory or of school athletic stadiums or structures, and for providing a site therefor, including off-street parking space, and making from time to time enlargements or extensions thereof, the board of directors of any six-director school district may issue and sell revenue bonds in an amount not to exceed the estimated cost of the dormitory or project, including costs necessarily incidental thereto. No such bonds shall be issued and sold unless at the time of the issuance thereof the board of the school district issuing them shall pledge the net income and revenues of the dormitory or project to the payment of the bonds, both principal and interest, and covenant to fix, maintain and collect such reasonable rates, rentals and charges for admission of spectators to witness such games, contests and exhibitions, and returns and charges for concessions and broadcasting as in the judgment of such

Honorable C. M. Bassman

board of directors will provide revenues sufficient to pay the reasonable cost of operating and maintaining such dormitory or project and to provide and maintain an interest and sinking fund in an amount adequate promptly to pay the principal of and interest on such bonds. Nothing herein shall prevent the board from authorizing use of the dormitory or project and admittance thereto without charge at such time and for such occasions and to such extent as the board determines. In addition to pledging the net income and revenues as herein provided, the board in its discretion may mortgage, by mortgage or deed of trust, the real and personal property comprising the dormitory or project or portions thereof for the payment of the bonds, both principal and interest, and as additional security therefor may by the terms of the mortgage or deed of trust grant to the purchaser in case of foreclosure sale thereof the right and privilege to operate the dormitory or project, subject to the limitations and conditions set out in the mortgage or deed of trust. The revenue bonds are payable, both as to principal and interest, solely and only out of the net income and revenues arising from the operation of the dormitory or project for which they were issued, after providing for the costs of operation and maintenance as aforesaid, or from other funds made available to the school district from sources other than proceeds of taxation, or from proceeds of foreclosure sale of property mortgage or pledged as security therefor." (Emphasis supplied)

Do the net revenues received by the District as tuition qualify as ". . . other funds made available to the school district from sources other than proceeds of taxation. . .?" We believe they do not because all tuition received by the school district must go into the teachers' fund and cannot be transferred out of that fund. Therefore, tuition moneys would not be available to the school district to pay the principal and interest on revenue bonds.

Honorable C. M. Bassman

Section 165.011 RSMo Supp. 1967 states in part:

"1. The following funds are created for the accounting of all school moneys: Teachers' fund, incidental fund, free textbook fund, building fund, and debt service fund. The treasurer of the county, township or school district shall open an account for each fund specified in this section, and all moneys received from the county school fund, all moneys derived from taxation for teachers' wages, all tuition fees, and not less than eighty per cent of the state moneys received under subsections 1, 2 and 3 of section 163.031, RSMo, and all other moneys received from the state except as herein provided, shall be placed to the credit of the teachers' fund."

Therefore, all tuition fees received by the district must be placed in the teachers' fund. Although, we find statutory authority for transfer between certain other funds for certain purposes, (see for instance, paragraph 2, Section 165.011), we find no statutory authority for transferring moneys from the teachers' fund to either the incidental or debt service funds.

The funds of the school district belonging to the teachers' fund constitute a trust fund for the purposes provided by statute. Any use of the moneys in that fund for other purposes than to pay teachers' salaries or to pay tuition would subject the Board to liability. State to Use of Consolidated School Dist. No. 42 of Scott County v. Powell, 221 S.W.2d 508 (Mo. 1949) and Sections 165.011 and 165.021 RSMo 1959.

CONCLUSION

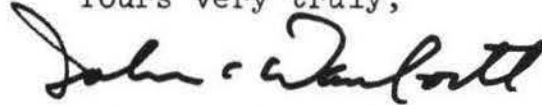
It is the opinion of this office that a six-director school district in Missouri is not authorized to pledge net revenues received as tuition from persons attending a vocational school operated by the school district as security for the payment of the principal and interest on revenue bonds issued by the district pursuant to

Honorable C. M. Bassman

Section 164.231, RSMo Supp. 1967, as amended, to finance the cost of constructing a dormitory to be used to house persons attending such vocational school.

The foregoing opinion, which I hereby approve, was prepared by my assistant, D. Brook Bartlett.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being more prominent and the last name "Danforth" written in a more compact, flowing style.

JOHN C. DANFORTH
Attorney General

STATE COLLEGES:
SCHOOLS:

There is nothing in the Missouri Constitution or statutes or the United States Constitution prohibiting the placing of student teachers in parochial or private schools as part of the student teaching programs at Northeast Missouri State College.

OPINION NO. 56

February 4, 1970

Mr. Clyde Burch, General Counsel
Northeast Missouri State College
Kirksville, Missouri 63501



Dear Mr. Burch:

This letter is in response to your request for an official opinion of this office on the following question:

" . . . our Directors of Student Teaching have inquired as to the legality of placing unpaid practice teachers (teacher interns) in parochial or private (non-sectarian military academies). In this situation our college teachers do not perform services at the parochial school except to furnish guidance and assistance to the unpaid teacher intern who is not an employee of either the state or the parochial school."

You enclosed with your opinion request certain materials providing a description of the student teaching program at Northeast Missouri State College. From this information, the following facts concerning the program have been obtained. The student teaching program is part of an overall program for the preparation of public school teachers. In fact, student teaching experience is a prerequisite to obtaining the degree of Bachelor of Science in Education from the college. The facilities for student teaching are provided by elementary and secondary schools throughout the State of Missouri cooperating with the college as teacher education centers. These schools provide typical situations in which prospective teachers may, through observation and participation, learn teaching methods and principles of administration. However, because of the increasing demand for student teaching positions, there is a problem in finding positions for all student teachers. A student teacher is not paid a salary. Each student teacher is assigned to a cooperating teacher in a secondary or elementary school. The cooperating teacher assists and directs the student teacher. Near the end of the student teaching experience, the cooperating teacher and the

Mr. Clyde Burch

college supervisor confer together to evaluate the work of the student teacher. Each cooperating teacher or her school is awarded a sixty-five dollar honorarium by Northeast Missouri State College.

College supervisors are members of the academic divisions of Northeast Missouri State College. These supervisors observe the work of student teachers and, during their visits to the classroom in which the student teacher is working, confer both with the cooperating teacher and the school administrator.

With the foregoing as a basic outline of the student teaching program at Northeast Missouri State College, we will now examine whether there is any Missouri constitutional or statutory prohibition on placing student teachers in parochial or private schools.

The Missouri Constitution prohibits the granting of public money in aid of any private person or organization.

"The general assembly shall have no power to grant public money or property, or lend or authorize the lending of public credit, to any private person, association or corporation, excepting aid in public calamity, . . ."
Article III, §38(a), Mo.Const)

* * * *

"The general assembly shall not have power:

"(1) To give or lend or to authorize the giving or lending of the credit of the state in aid or to any person, association, municipal or other corporation;

"(2) To pledge the credit of the state for the payment of the liabilities, present or prospective, of any individual, association, municipal or other corporation;" (Article III, §39(1) (2), Mo.Const.)

* * * *

"No county, city or other political corporation or subdivision of the state shall own or subscribe for stock in any corporation or association, or lend its credit or grant public money or thing of value to or in aid of any corporation, association or individual, except as provided in this Constitution." (Article VI, §23, Mo.Const.)

Mr. Clyde Burch

These prohibitions would apply to Northeast Missouri State College and would prohibit it from granting any money or thing of value to the aid or assistance of any private person or organization.

Furthermore, there are two constitutional sections prohibiting the grant of any state moneys to the aid of religious schools.

"That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination or religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship." (Article I, §7, Mo.Const.)

"Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any county, city, town, or other municipal corporation, for any religious creed, church, or sectarian purpose whatever." (Article IX, §8, Mo.Const.)

With the exception of the sixty-five dollar payment to the cooperating teacher, the placing of student teachers in private or parochial schools, pursuant to the program outlined above, would not involve the payment, grant, gift or donation by Northeast Missouri State College of public money or thing of value to a private or parochial school. Therefore, we do not believe that the program would violate any of the foregoing constitutional prohibitions on furnishing state aid to private or parochial schools or to private persons. Furthermore, we find it difficult to determine whether any benefit in a form other than monetary would flow from Northeast Missouri State College to a private or parochial school. However, assuming that there is such a benefit conferred on the private or parochial school by the presence in the classroom of a student teacher, the analysis which follows pertaining to the sixty-five

Mr. Clyde Burch

dollar honorarium awarded to the teacher or the school in which the student teacher is placed would also apply to such other benefit regardless of form.

In Kintzele v. City of St. Louis, 347 S.W.2d 695 (Mo. en banc 1961), plaintiffs contended that the sale of land under the Redevelopment Law (Chapter 99, RSMo 1959) to a private sectarian school violated the state constitutional prohibitions against use of public funds in aid of religion. The court ruled against this contention quoting from a decision of the New York Court of Appeals involving a similar sale to Fordham University.

" . . . '[S]ince this sale is an exchange of considerations and not a gift or subsidy, no "aid to religion" is involved and a religious corporation cannot be excluded from bidding.'
 . . . " Id. at 700

The student teaching program of Northeast Missouri State College, described above, involves an agreement between the college and the cooperating secondary or elementary school that the student teacher will be permitted to assist a qualified teacher and thereby obtain valuable on-the-spot experience. In exchange for this opportunity, the college agrees to pay the sixty-five dollar honorariums. Also, the cooperating school receives whatever benefit there is from having the student teacher in the classroom with the regular teacher. In the words of the New York Court quoted above, we believe this represents an exchange of considerations and that no aid to religion is involved. As a matter of fact, it would appear that the benefit accruing to the college's student teaching program and to the student teacher far outweighs any benefit flowing to the cooperating school.

We are enclosing herewith copies of Opinion No. 164, June 2, 1966, and Opinion No. 354, December 19, 1958, in which this office has applied this "contract" theory in ruling on other questions in this area.

Furthermore, we do not believe that this student teaching program conflicts with the establishment clause of the United States Constitution. "Congress shall make no law respecting an establishment of religion. . . ." First Amendment, United States Constitution. This mandate has been made fully applicable to the states by the Fourteenth Amendment to the United States Constitution. Cantwell v. Connecticut, 310 U.S. 296 (1940). In Abington School District v. Schempp, 374 U.S. 203 (1963), the Supreme Court of the United States stated the test to be used to distinguish between forbidden involvement of the state with religion and those permitted by the establishment clause.

Mr. Clyde Burch

" . . . The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. . . ." Id. at 222

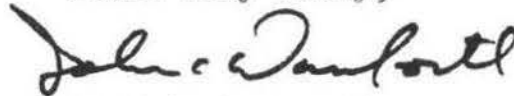
We see no basis to argue that the purpose and primary effect of the student teacher program have anything to do with religion.

CONCLUSION

Therefore, it is the opinion of this office that there is nothing in the Missouri Constitution or statutes or the United States Constitution prohibiting the placing of student teachers in parochial or private schools as part of the student teaching program at Northeast Missouri State College.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, D. Brook Bartlett.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 164
6-2-66, Wheeler

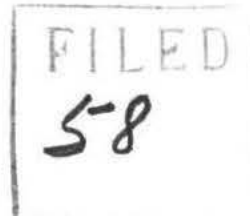
Op. No. 354
12-19-68, Morton

ANSWER BY LETTER: Ashby

March 17, 1970

LETTER OPINION NO. 58

Honorable Thomas R. Gilmore
Prosecuting Attorney
Scott County
217 South Kingshighway
Sikeston, Missouri 63801



Dear Mr. Gilmore:

This letter is written to answer your question on the computation of the interest that should be charged on "certificates of purchase" of real estate at delinquent tax sales.

As you noted in your letter, Section 140.290, V.A.M.S., provides the certificate, among other things, shall contain "the rate of interest that such certificate shall bear, which rate of interest shall not exceed the sum of ten per cent per annum." Section 140.340, V.A.M.S., provides for "interest at the rate specified in such certificate, not to exceed ten per cent annually."

The interest would begin to run from date of the certificate. *Stewart v. Brooks*, (Mo.) 28 Mo. 62, 1.c. 65. It is a familiar rule of law that "interest generally is computed to the time the debt is paid or merged in a judgment." (47 C.J.S., Section 41, p. 53 n. 21). Therefore, the right to interest would normally terminate when the money is "paid over to the county collector, for use of the purchases, his heirs or assigns" as provided in Section 140.340, V.A.M.S.

Accordingly, it is our view that interest on a "certificate of purchase" would be computed by allowing the interest rate specified in the certificate (but not in excess of ten

Honorable Thomas R. Gilmore

per cent) as provided in Section 140.340 from the date of sale and payment by the purchaser of his bid until the date when the money for redemption is paid over to the county collector.

Yours very truly,

JOHN C. DANFORTH
Attorney General

TEACHERS:
JUNIOR COLLEGES:
SCHOOLS:

Junior colleges organized pursuant to the provisions of Section 178.770 to 178.890, RSMo 1967 Supp., are not subject to the provisions of the Teacher Tenure Act, Sections 168.102 to 168.130 V.A.M.S.

OPINION NO. 59

March 17, 1970

Honorable John C. Ryan
State Senator--28th District
Rural Route 3, Walnut Hills
Sedalia, Missouri 65301



Dear Senator Ryan:

This letter is in response to your request for the opinion of this office on whether the Teacher Tenure Act is applicable to the junior colleges of the State of Missouri. The Teacher Tenure Act was enacted as House Bill No. 120 of the 75th General Assembly and has been renumbered by the Revisor of Statutes as Sections 168.102 to 168.130. The effective date of such act is July 1, 1970. See Section 168.102, V.A.M.S.

The statutory provisions pertaining to junior college districts are Section 178.770 to 178.890, RSMo 1967 Supp.

Section 178.770 states in part:

"2. When a district is organized, it shall be a body corporate and a subdivision of the state of Missouri and shall be known as 'The Junior College District of Missouri' and, in that name, may sue and be sued, levy and collect taxes within the limitations of sections 178.770 to 178.890, issue bonds and possess the same corporate powers as common and six-director school districts in this state, other than urban districts, except as herein otherwise provided."
(Emphasis added.)

At the outset, we note that the Teacher Tenure Act does not expressly pertain to junior college districts and would apply to junior college districts only if the Teacher Tenure Act constituted a grant of corporate powers to junior college districts not otherwise provided such districts by Sections 178.770 to 178.890.

Honorable John C. Ryan

In this respect, we note that Section 178.860, RSMo 1967 Supp., provides:

"The board of trustees shall appoint the employees of the junior college, define and assign their powers and duties and fix their compensation. All certificated personnel shall be members of the public school retirement system of Missouri under the provisions of section 169.010, RSMo."

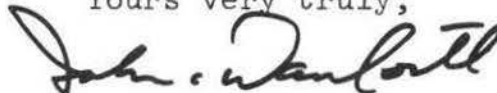
By this section the board of trustees of a junior college district is granted the specific authority to appoint teachers. Therefore, this corporate power has been "otherwise provided" to junior college districts and need not be obtained by reference from the statutory sections pertaining to common and six-director school districts.

CONCLUSION

It is therefore the opinion of this office that junior colleges organized pursuant to the provisions of Section 178.770 to 178.890, RSMo 1967 Supp., are not subject to the provisions of the Teacher Tenure Act, Sections 168.102 to 168.130 V.A.M.S.

The foregoing opinion, which I hereby approve, was prepared by my assistant, D. Brook Bartlett.

Yours very truly,



JOHN C. DANFORTH
Attorney General

ESCHEAT:
INSURANCE:

There are no laws of Missouri requiring escheat of funds held by insurance companies currently doing business.

September 30, 1970

OPINION NO. 63

Mr. William Y. McCaskill
Superintendent
Division of Insurance
Department of Business
and Administration
100 East Capitol
Jefferson City, Missouri 65101



Dear Mr. McCaskill:

This official opinion is issued in response to the request contained in your letter concerning the escheat laws of the State of Missouri. The question raised is as follows:

"It has come to the attention of the Superintendent, Division of Insurance, by reason of examination into the financial affairs of Missouri domiciled insurance companies and foreign insurance companies licensed to do business in the State of Missouri, that some companies have established reserves or liability accounts for funds represented by uncashed checks of the company payable to various persons for dividends, premium refunds, claims and the like. Oftentimes these funds are maintained in these reserve accounts for many years.

"Question has arisen whether or not there are any Missouri Laws requiring the ultimate escheat of these funds to the State of Missouri or if there are any procedures by which the funds can be escheated to the State."

As we understand the request, the funds in question are in the possession of companies currently doing business and not in the

Mr. William Y. McCaskill

process of liquidation. Section 375.760, RSMo 1969, sets forth a procedure to be followed in cases where an insurance company is being liquidated, but this procedure is not available in any other situation. Likewise, Section 379.395 contains a provision for escheat of certain funds held by the Superintendent of Insurance arising from a determination of unreasonable rates charged by certain insurance companies, but this does not apply to the factual situation involved here.

General provisions relating to escheats are found in Chapter 470, RSMo 1969. These provisions are limited to certain cases as expressed therein, being mainly those arising out of administration of estates of deceased persons, receiverships, sheriffs' sales, and funds in custody of courts. None of these would be applicable to the factual situation outlined in your letter.

In brief, there are no statutory provisions in Missouri which govern the type of case mentioned in the request, and escheat would occur only if there is a body of nonstatutory law applicable to these facts.

In this regard, the Attorney General's Office rendered Opinion No. 203 to the Honorable Maurice Schechter February 27, 1968, in which it was found that any unclaimed assets of a liquidating corporation will escheat to the State of Missouri under the common law. The principal authority for this conclusion appears to be State ex rel. McDowell v. Libby, 175 S.W.2d 171 (K.C.App.1943) where it was held that at common law a dissolved corporation's property escheated to the Crown, all debts due to or from it were extinguished and all pending suits and actions by and against it were abated. The corporation involved there was in liquidation following a forfeiture of its charter.

There is nothing in our prior opinion or the authority cited therein indicating that there is a common law escheat in cases where the corporation is in good standing and currently engaged in business. Likewise, the common law principle of escheat was applied to property of the liquidating corporation rather than to property of a third party held by the corporation.

We are not aware of any case which holds there is an escheat at common law of property owned by a person who cannot be located and held by a company currently engaged in business. Many states have remedied this situation by adopting legislation covering the disposition of unclaimed property generally. Such legislation was presented to the General Assembly of Missouri at the last session but failed to pass.

CONCLUSION

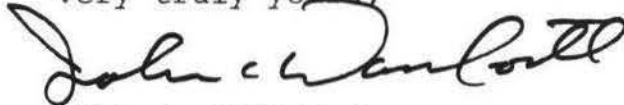
Therefore, it is the opinion of this office that there are no laws of Missouri requiring escheat of funds held by insurance companies

Mr. William Y. McCaskill

currently doing business.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John E. Park.

Very truly yours,

A handwritten signature in cursive script, reading "John C. Danforth". The signature is written in dark ink and is positioned above the printed name and title.

JOHN C. DANFORTH
Attorney General

REVENUE BONDS:
CITIES, TOWNS & VILLAGES:
SEWERS:

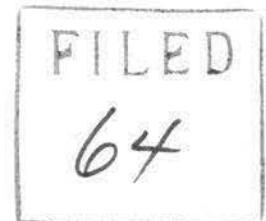
The municipality of Oak View has the authority to conduct a bond election for the issuance of revenue bonds to extend and improve a sewerage system.

The municipality may impose user charges on those persons connected with the system, and need not tax vacant land within the city for the support of the sewerage system.

OPINION NO. 64

March 2, 1970

Honorable Phillip H. Snowden
State Representative
District No. 86
313 Armour Road
North Kansas City, Missouri 64116



Dear Representative Snowden:

Your recent opinion request inquired:

1. Whether the City of Oak View possessed the authority to conduct a bond election for the issuance of revenue bonds for construction of a sewer system, and;
2. Whether it is legal to require payment only from the persons actually using the sewer and not charge all of the vacant property within the village?

The ballot in the special election in Oak View August 26, 1969, provided, in part, as follows:

"Shall the following be adopted:

"Proposition to issue the sewerage system revenue bonds of the Village of Oak View, Missouri, to the principal amount of \$185,000 for the purpose of extending and improving the sewerage system of said Village by constructing lateral sewers, . . ."

Statutory authority for the City of Oak View to construct and maintain a sewerage system is granted by Section 250.010, RSMo 1959. That statutory provision states, in part:

- "1. In addition to all powers granted by law and now possessed by cities, towns and villages

Honorable Phillip H. Snowden

in this state for the protection of the public health, any city, town or village, whether organized under the general law or by special charter or constitutional charter, and any sewer district organized under chapter 249, RSMo, as that chapter now exists, or as it may be amended, is hereby authorized to acquire, construct, improve or extend and to maintain and operate a sewerage system and to provide funds for the payment of the cost of such acquisition, construction, improvement or extension and operation as hereinafter provided. Such sewerage system may be constructed and operated either within or without the corporate boundaries of any such city, town or village or sewer district."

The provisions relevant to the financing of sewerage systems extended and improved by cities are stated in Section 250.040, RSMo 1959. That section provides:

"The cost to any such city, town or village of acquiring, construction, improving or extending a sewerage system or a combined waterworks and sewerage system may be met:

"(1) Through the expenditure by any such city, town or village of any funds available for that purpose;

"(2) Through the issuance of bonds for that purpose of the city, town or village payable from taxes to be levied by such city, town or village;

"(3) From the proceeds of special assessments levied and collected in accordance with law;

"(4) From any other funds which may be obtained under any law of the state or of the United States for that purpose; or

"(5) From the proceeds of revenue bonds of such city, town or village, payable solely from the revenues to be derived from the operation of such sewerage system or combined waterworks and sewerage system or from any combination of any or all such methods of providing funds."

Honorable Phillip H. Snowden

Therefore, statutory authority exists permitting cities to extend and improve sewerage systems and issue revenue bonds to finance such systems.

Statutory authority also exists for the levying of user charges upon those using the sewerage system. See Section 250.040 (5), RSMo 1959, quoted supra. That provision basically provides that the revenues derived from the operation of the sewerage system are to be used to redeem the revenue bonds issued to extend and improve the system.

Section 250.100, RSMo 1959, authorizes a city to levy user charges to pay the revenue bonds issued for the improvement and extension of the system. This statutory provision provides, in relevant part, that the bonds may be payable from the revenue derived from the operation of the entire sewerage system of the city or from revenue derived from the operation of the sewerage system in a particular locality. The bond election ballot stated that:

" . . . the cost of operation and maintenance of said sewerage system and the principal of and interest on said sewerage system revenue bonds to be payable from the revenues derived by said Village from the operation of its sewerage system."

The foregoing statement as to the source of payment for the revenue bonds is consistent with the authority granted by Section 250.100, RSMo 1959, for extending or improving sewerage systems.

Section 250.120, RSMo 1959, expressly directs a municipality to impose user charges on those connected to the sewerage when revenue bonds are issued. That section specifically states:

"1. It shall be the mandatory duty of any city, town or village or sewer district which shall issue revenue bonds pursuant to this chapter to fix and maintain rates and make and collect charges for the use and services of the system for the benefit of which such revenue bonds were issued, sufficient to pay the cost of maintenance and operation thereof, . . ."

This section also directs the imposition of user charges even if the sewerage system had been financed by other means previously.

Further authority permitting the imposition of user charges is found in Sections 250.140 and 250.150, RSMo 1959. The language

Honorable Phillip H. Snowden

in these sections clearly indicates that the recipients of sewerage service are to pay for these services through user charges. Therefore it is clear that the municipality could impose user charges on those persons connected to the sewers and is in no way required also to levy charges on vacant property within the municipality.

The decision of *City of Maryville v. Cushman*, 249 S.W.2d 347 [8] (Mo. 1952), construing Chapter 250, the chapter authorizing a construction of sewerage systems, stated that it is permissible for a city to levy a user charge on those connected to the sewerage facility and that the sewerage system need not be maintained by general taxation. That decision stated:

" . . . It is first contended the respondent city may not now make a charge for the use of a presently existing sewer system where no such charge for such sewer use has been heretofore made. . . . We find any number of well-reasoned cases to the effect that such charges may be constitutionally made." (at 353)

After citing numerous other cases, the court continued:

" . . . Authorities upholding the right of municipalities to levy a charge for the use of the city sewerage system could be multiplied. But the above are sufficient. The rule of the above cited cases is that the original construction of a sewerage system does not bind the city to forever maintain it from general taxation, nor may it be implied that a citizen may forever use the sewerage system without charge, and that a charge may therefore be made for the use of the sewerage facility, 'a benefit distinct from that originally conferred by building it.' The respondent city by heretofore maintaining its sewerage system through taxation did not impliedly or otherwise bind itself never to charge for its use. Such sewerage charges are but charges for a service rendered. . . ." (at 353)

Indeed, the concept of revenue bonds embodies the principle that the recipients of the service, and not the public at large, are to bear the costs incurred in rendering the service.

CONCLUSION

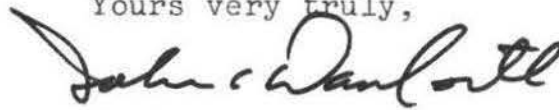
Honorable Phillip H. Snowden

It is the conclusion of this office that the municipality of Oak View has the authority to conduct a bond election for the issuance of revenue bonds to extend and improve a sewerage system.

The municipality may impose user charges on those persons connected with the system, and need not tax vacant land within the city for the support of the sewerage system.

The foregoing opinion, which I hereby approve, was prepared for me by my Assistant, Peter H. Ruger.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a stylized "D".

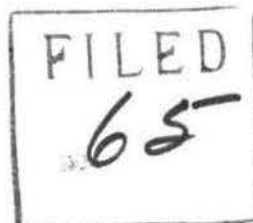
JOHN C. DANFORTH
Attorney General

COUNTY ASSESSORS: For purposes of the Social Security Act:
COUNTY CLERKS: 1. County clerks and county assessors are
SOCIAL SECURITY: employees of the counties and township
TOWNSHIP COLLECTORS: collectors are employees of the townships
wherein they were elected to office. They
are not "joint employees" of several political entities. 2. A
township collector is an official of the township. 3. Fees derived
by a township collector from collecting school taxes do not consti-
tute "wages"; therefore, a township is not responsible for reporting
and paying the employer's share of the Social Security Tax thereon.

OPINION NO. 65

June 11, 1970

Honorable John C. Vaughn
Comptroller & Budget Director
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Vaughn:

This official opinion is issued in response to the request contained in your letter concerning the reporting of fees for social security purposes paid county clerks and county assessors by both the state and the county and fees paid township collectors by the townships, counties and state.

More specifically, the questions raised are as follows:

1. "Are these individuals considered a 'joint employee' and the present maximum of \$7,800 reported in aggregate or should maximum deductions and maximum reportings be made separate by each?"
2. "In addition is the Township Collector considered to be an official of the Township?"
3. "Is the Township responsible for reporting and paying the matching portion of contributions due on fees derived from collecting school taxes by the Collector?"

Although services performed in the employ of a state or political subdivision thereof are expressly exempt from the provisions of the Social Security Act (Section 410(a)(7)), the benefits of Title 2 of the Act and the taxes imposed by the Internal Revenue Code in connection therewith may be extended to the states, their political

Honorable John C. Vaughn

subdivisions and the employees thereof by appropriate agreements with the Secretary of Health, Education and Welfare. The State of Missouri has entered into such an agreement in conformity with Section 218 of the Social Security Act and the enabling law of Missouri (Section 105.300 et seq., RSMo 1959, as amended).

A determination of the status of the officials in question as well as the rights and obligations of the state and its political subdivisions requires an interpretation of the Social Security Act, the Missouri statute and the Section 218 Agreement. It entails also a consideration of other Missouri statutes and general principles of law applicable to the problem.

The nature or character of these offices and the duties to be performed by the holders thereof are prescribed by the constitution and statutes.

Chapter 51, RSMo 1959, relating to county clerks provides:

"In each county of this state there shall be an office of clerk of the county court, to be styled 'The Office of the Clerk of the County Court.' (Section 51.010).

"At the general election in the year 1946, and every four years thereafter, the qualified electors of the county at large in each county in this state shall elect a clerk of the county court, who shall be commissioned by the governor and who shall hold his office for a term of four years and until his successor is duly elected or appointed and qualified. Each clerk of the county court shall enter upon the duties of his office on the first day of January next after his election." (Section 51.020).

It is further provided that the county clerk shall give bond conditioned upon faithful performance of the duties of his office, (Section 51.070, RSMo 1959) and shall take and subscribe to an oath to support the Constitution of the United States and of the State of Missouri and demean himself faithfully in office. (Section 51.060, RSMo 1959). The duties of the county clerk as set forth in the statutes need not be considered in detail herein, it being sufficient to observe that these duties relate to business matters affecting the county in which the clerk serves.

Chapter 53, RSMo 1959, relating to county assessors, contains authority for election of this official by the qualified voters in each county and sets forth requirements of oath and bond. The oath charges that he will demean himself faithfully in office and assess all of the real and tangible personal property in the county. (Section 53.020, RSMo 1959). The duties of the county assessor relate

Honorable John C. Vaughn

to business matters of the county which he serves.

Chapter 65, RSMo 1959, relating to township organization counties states:

"The citizens of the several townships in all counties having adopted the township organization law of this state * * * shall assemble * * * for the purpose of electing township officers * * * " (Section 65.060).

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"There shall be chosen at the biennial election in each township * * * one township collector, * * * " (Section 65.110).

The collector must furnish bond conditioned upon faithful and punctual collection and payment of all state, county, township and other revenue, including school taxes, and that he will in all things faithfully perform all the duties of the office of township collector according to law. (Section 65.460). The duties of this official are expressly set forth in the constitution and statutes and relate to business transacted within the township.

While the law imposes on these county officials certain duties for the benefit of the state as well as the county, and township collectors have a statutory duty to collect state, county and school taxes as well as township taxes, they are nonetheless officers only of the political subdivisions wherein they are elected. Their duties extend only to the boundaries of the subdivisions and are not by any means statewide in character. The work performed for the state as required by statute relates only to matters which must be performed in the county or township respectively, and as to the county functions handled by township officials they are restricted to township boundaries and not to the county as a whole.

The Supreme Court of Missouri has made it clear that state officers must have statewide functions. In State ex rel. Kirks v. Allen, Mo.1952, 250 S.W.2d 348, the court held as follows:

"Relator next contends that jurisdiction is here in that Sec. 3, Art. V, V.A.M.S. vests in this court appellate jurisdiction in all cases in which 'any state officer as such is a party'; and that respondent prosecuting attorney, a party in his official capacity, is a 'state officer.' True, there has been delegated to respondent, a duly qualified and acting prosecuting attorney, some substantial part of the state's sovereign power, to be independently 'exercised with some continuity and without control of a superior power other than the law.' See State ex rel. Webb v. Pigg, 249 S.W.2d 435, decided by this

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court en banc, June 9, 1952. Yet that is not the determinative factor as to our jurisdiction under Sec. 3, Art. V.

"In State ex rel. Rucker v. Hoffman, Judge, 313 Mo.667, 288 S.W.16,17 (wherein it was held that a circuit judge was not a 'state officer' under the constitutional provision prescribing appellate jurisdiction), we said that no officer is a 'state officer' under such constitutional provision 'unless his official duties and functions are coextensive with the boundaries of the state.' The ruling in the Hoffman case has since been followed in State ex rel. and to use of Gorman v. Offutt, Mo.Sup., 9 S.W.2d 595; Bank of Darlington v. Atwood, 325 Mo. 123, 27 S.W.2d 1029; Dietrich v. Brickey, 327 Mo. 189, 37 S.W.2d 428; and Fischbach Brewing Co. v. City of St. Louis, 337 Mo.1044, 87 S.W.2d 648.

"We again approve, and here apply, the rule applied in those decisions. Respondent prosecuting attorney's official duties and functions are not coextensive with Missouri's boundaries. His rights and duties (to exercise portions of the state's sovereign powers) are limited to Linn County, the county in which he was elected and which he is now serving. We hold that he is not a 'state officer' within the purview of Sec. 3, Art. V."

Likewise in Hasting v. Jasper County, Mo. 1926, 282 S.W.700, the court held:

"Nor can it be said that probation officers are state officers. We have held that the words 'state officers' as used in the Constitution refer to such officers whose official duties and functions are co-extensive with the government of the state. Following this rule, we have held that a sheriff, deputy sheriff, and a clerk of a circuit court are not state officers, for the reason that their jurisdiction is confined to a county. State ex rel. Walker v. Bus, 36 S.W.636, 135 Mo.325, 33 L.R.A. 616; State ex rel. Holmes v. Dillon, 2 S.W. 417, 90 Mo.229; State ex rel Bender v. Spencer, 3 S.W. 410, 91 Mo. 206; State ex rel Conway v. Hiller, 180 S.W. 538, 266 Mo.242, loc. cit. 262."

The same rule appears to be applicable insofar as the relationship between the township collector and the county is concerned. In other words, the township collector is an officer of the township but not of the county or the state, and the county clerk and county assessor are officers of the county but not of the state or township. An opinion rendered by this office October 27, 1961, issued to Charles D. Trigg, bears on the matter under consideration. We enclose

Honorable John C. Vaughn

a copy of such opinion. A portion of the language of this opinion reads as follows:

" * * * This raises the question of whether township officers may be considered county officers within the meaning of the law. (House Bill 635, 71st General Assembly). In our opinion, a township officer is not a county officer and therefore in no event would the provisions of the new law be applicable to any township officer even if he otherwise met the requirements of that law.

*

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*

"* * * While it is true that township collectors collect taxes for the county and state as well as the township itself (and also must account to the county court, Section 139.420), such fact does not make the collector a county officer any more than it makes him an officer of the school district by reason of collecting school taxes. * * * "

While the general rule is that an officer is not an "employee" of the political subdivision or instrumentality or body which he serves since strictly speaking there is no employment relationship between an officer and the sovereign which he serves, State ex rel. Hull v. Gray, 91 Mo.App.438 (1902); State ex rel Zevely v. Hackmann, 300 Mo.59, 254 S.W. 53 (1923); State ex inf. Barrett ex rel. Bradshaw v. Hedrick, 294 Mo.21, 241 S.W. 402 (1922); Section 218(b)(3) of the Social Security Act; Section 105.300(2), RSMo 1959, the enabling act, and Paragraph A(2) of the agreement between the Federal Government and the State of Missouri all provide that the term "employee" includes elective and appointive officers of the state and elective and appointive officers of any political subdivision of the state. Therefore, it is clear that the officers in question being officers of political subdivisions are, for purposes of the Social Security Act, employees of the political subdivisions as well. The fact that they are so considered for social security purposes does not alter their duties or the nature of their offices under state law.

Furthermore, it is our view that the status or character of the offices of these individuals is not changed by reason of the fact that part of the compensation therefor is derived from the fees deducted from moneys collected for the state or county or both as the case may be, or derived from fees collected from some source other than the funds of the particular political subdivision in which they are elected to serve. The fact that these officers perform services imposed by statute for the benefit of the state or a political subdivision of which they are not an officer and the further fact that they collect fees or compensation therefrom is not sufficient under the law to constitute an employment relationship

Honorable John C. Vaughn

between these parties.

Section 410(j) of U.S.C.A., relating to social security taxes, reads as follows:

"The term 'employee' means --

*

*

*

"(2) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee; * * * "

In *Thurston v. Hobby*, 133 F. Supp. 205 (U.S.D.C., Mo. 1955), the court said:

" * * * The mere payment of wages, standing alone, is not enough to establish the relationship of employer and employee. * * * No one fact or circumstance is necessarily conclusive of such a relationship. It must be determined from all the surrounding circumstances shown to exist. In its common law and usually accepted sense, such relationship is tested by (a) the contractual relationship of the parties; (b) direction and control; (c) compensation to be paid therefor; and, (d) services rendered. * * * "

Again, the basic ingredient of a master and servant relationship is the right of a master to control physical activities of the servant or the right to direct the servant in regard to the manner of performance. *Coble v. Economy Forms Corporation*, 304 S.W.2d 47.

In *Knight v. Cameron Joyce & Co.*, 252 F.2d 103, it was held that under Missouri law in determining whether the relationship of master and servant exists, one of the essential elements is the right to control the manner and means of the service being performed as distinguished from controlling the ultimate results of the service. See also *Hammons v. Haven*, 280 S.W.2d 814; *Talley v. Bowen Construction Company*, 340 S.W.2d 701; *St. Francois County Savings & Loan Association v. Industrial Commission*, 395 S.W.2d 311.

In *Anderson v. Celebrezze*, U.S.D.C., N.D. of Indiana, Lafayette Area, Hammond Div. No. 147 (11/15/62) C.C.H. UIR-1 Fed. Par. 14733 (CB 1968-SSR 63-51c) it was held that where a state extended social security coverage under an agreement pursuant to Section 218 of the Social Security Act to employees of a county but not to employees of a township within such county, and where pursuant to state law, officials of the township appointed a deputy tax assessor who was compensated by the county but whose services were performed under the direct supervision and control of the township officials, the deputy tax assessor was an employee of the township and not an employee of the county, and since coverage was not extended to employees of the township, his services were not covered for social

Honorable John C. Vaughn

security benefit purposes. In the opinion the court said:

"The Bureau of Old-Age and Survivors' Insurance determined that the services performed by plaintiff as Deputy Tax Assessor in Union Township, White County, Indiana, did not constitute 'employment' as defined in the Act; that the remunerations received by him for such services were therefore not 'wages' creditable to his earnings record, and, therefore, that no benefits [are payable] to plaintiffs.

"It was clearly perceived by the hearing examiner that although the officials of White County were under the impression that plaintiff as a Deputy Union Township Assessor was covered by the agreement providing coverage for employees of White County and although the Attorney General of Indiana had submitted an opinion that Deputy Union Township Assessors were officers of Union Township and not of White County neither of those determinates could be binding upon the defendant, rather the hearing examiner considered all the factors relevant to the question of plaintiff's status, such as by whom the salary was paid, the degree of control which could be exercised over him and by whom in the discharge of his duties, etc. There was substantial evidence to support the conclusion that although the township officials were paid from the county treasury, this was merely a matter of administrative convenience and economy and that the county could not legally control the exercise by the township officials and their employees of their respective duties, whatever degree of cooperation there may have been between the two political subdivisions.

"Such being the case there can be no question but that the hearing examiner's decision that plaintiff was an employee of Union Township and not White County was supported by substantial evidence and therefore is conclusive."

Judgment was entered for the defendant.

In the present matter, the county and the township officials being elective officers, there is no contract of employment existing outside the statutes regulating such offices. There is no right on the part of the state, for example, to terminate the employment relationship and no control over the performance of the duties of the officials of these political subdivisions. Under these circumstances it is our view that no employment relationship exists between these

Honorable John C. Vaughn

officials and the state or between the township collectors and the counties.

There is nothing in the Social Security Act, the Statutes of Missouri or the Section 218 agreement between the state and federal government which creates such an employer-employee status in this situation except between the officer and the political subdivision in which he is elected.

Accordingly, it must be concluded that the county collectors and county assessors are officers and thus employees of the county, and the township collectors are officers and thus employees of the township in each instance. They are not employees of any other political entity. It follows that the county is the employer of the county clerk and the county assessor and the township is the employer of the township collector for the purposes of the Social Security Act, and the reporting of fees or wages required thereby should be made on this basis.

Attorney General Opinions rendered to Philip A. Grimes, dated October 26, 1951 and November 19, 1951, holding that certain officers are employees of the state and also employees of the county, are withdrawn.

The question raised by your letter as to the responsibility of the township to pay social security tax on fees received by its collector for collecting school taxes requires additional consideration herein. This presents the problem of what constitutes "wages" in addition to the employment relationship treated above.

Section 3111 of the I.R.C. of 1954 states as follows:

"In addition to other taxes, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages * * * " (Emphasis supplied).

Section 3121 of the Code defines "wages" as follows:

"(a) Wages. --For purposes of this chapter, the term 'wages' means all remuneration for employment, * * * "

Section 105.300(11), RSMo 1959, as amended, (enabling act), provides:

"'Wages', all remuneration for employment as defined herein, including the cash value of all remuneration paid in any medium other than cash, except that the term shall not include that part of such remuneration which, even if it were for 'employment' within the meaning of the Federal Insurance Contributions Act, would not constitute 'wages' within the meaning of that act."

Honorable John C. Vaughn

In the situation under consideration there is an employer-employee relationship between the township and the township collector. There is no such relationship between the school district and the collector. The question is therefore whether the fees taken from taxes collected for the school district constitute "wages" within the meaning of the law. Stated a little differently, if the remuneration is paid by a third party rather than an employer, does it constitute "wages" upon which the tax is imposed?

Treasury regulations relating to the social security tax on employers (F.I.C.A.) contain the following language:

"§31.3111-4 Liability for employer tax

"The employer is liable for the employer tax with respect to the wages paid to his employees for employment performed for him."

The employer is liable for the employer tax with respect to the wages paid to his employees for employment performed for him.

Section 31.3121(a)-1 of the Internal Revenue Code entitled "Wages", reads as follows:

" * * *

"(b) The term 'wages' means all remuneration for employment unless specifically excepted * * * " (Emphasis supplied)

The Federal Government has issued a ruling (S.S.T.206,C.B. 1937-2, 451) wherein it was held:

" * * * In order to constitute wages subject to the Act, they must be received for services performed by an employee for his employer in an employment subject to the law. The bonuses are not remuneration performed for the dealers, (Employer) but are compensation for services rendered to the manufacturer (Third party). The salesmen (Employees) are not employees of the manufacturer and therefore the bonuses do not constitute wages subject to the Act."

In another ruling of the Federal Government, i.e., 55 SST 56 (XV 51-8447) it was held that where services are performed by caddies for members of the M Club and they are compensated either directly or indirectly for such services by the club members, the club will not be required to pay the tax imposed by Section 901, Title IX of the Social Security Act with respect to such payments to the caddies even though the caddies may be its employees. If, however, the caddies perform any services for the club for which the club itself compensates them, the club is subject to the tax imposed by Section

Honorable John C. Vaughn

901 of the Act with respect to such employment.

In the matter under consideration the fees received from collecting school taxes are not paid by an employer to an employee for services performed for the employer. The township collector is not an employee of the school district and therefore the fees do not constitute wages subject to the Act.

CONCLUSION

Therefore, it is the opinion of this office that for purposes of the Social Security Act:

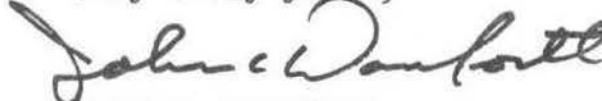
1. County clerks and county assessors are employees of the counties and township collectors are employees of the townships wherein they were elected to office. They are not "joint employees" of several political entities.

2. A township collector is an official of the township.

3. Fees derived by a township collector from collecting school taxes do not constitute "wages"; therefore, a township is not responsible for reporting and paying the employer's share of the Social Security Tax thereon.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John E. Park.

Very truly yours,



JOHN C. DANFORTH
Attorney General

Encls:
OP.-10/27/61-Trigg

TAXATION (EXEMPTIONS):

In a situation where a private individual conveys a parcel of real estate to the University of Missouri by deed of gift, reserving a life estate in himself which is thereafter leased to the University, the life estate is exempt from taxation only if put to the exclusive use of the University for school purposes and only if the lease does not provide for other than nominal rent payments to the lessor; if not found to be exempt, only the life estate in the hands of the grantor is subject to taxation and tax sale.

OPINION NO. 67

April 3, 1970

Honorable John W. Briscoe
Prosecuting Attorney
Knox County Court House
Edina, Missouri 63537



Dear Mr. Briscoe:

This official opinion is issued in response to your request for a ruling by this office on the following question:

Where a private individual has conveyed, by deed of gift, a parcel of real estate to the University of Missouri, but has reserved a life estate which is subsequently leased to the University, is that real estate subject to taxation; if so, in what amount; and, if taxes due were not paid, what interest in the property would be subject to levy and public sale?

A two part response is necessary to properly dispose of your inquiry. First to be considered is whether the real estate involved is exempt from taxation. Secondly, if not exempt, what estate in the land is subject to tax assessment and, therefore, subject to tax sale?

In regard to whether this real estate parcel is tax exempt, certain rules are relevant. To begin with, all property is subject to taxation unless specifically exempted. Exemption claims are not favored in the law. Therefore, unless the constitution and statutes of the State of Missouri expressly exempt the property in question, it is subject to taxation. Bethesda General Hospital v. State Tax Commission, 396 S.W.2d 631, 633 (Mo. 1965); Midwest Bible & Missionary Institute v. Sestric, 260 S.W.2d 25, 29-30 (Mo. 1953). However, the construction of exemption statutes must be reasonable, and each

tax exemption case must be decided upon its own particular facts. Mid-west Bible & Missionary Institute v. Sestric, supra at 30. The person claiming the tax exemption has the burden of proof thereon. In re First Nat. Safe Deposit Co., 173 S.W.2d 403, 405 (Mo. En Banc 1943). On the other hand, exemption statutes are not to be construed so as to limit the intended scope of the exemptions therein provided. St. Louis Gospel Center v. Prose, 280 S.W.2d 827, 830-831 (Mo. 1955).

With these general principles in mind, we should next examine the specific tax exemption provision in Missouri law. Constitutional exemption from taxation of certain property is granted by Article X, Section 6, and Article III, Section 43 of the Constitution of Missouri.

Article X, Section 6, provides:

All property, real and personal, of the state, counties and other political subdivisions, and non-profit cemeteries, shall be exempt from taxation; and all property, real and personal, not held for private or corporate profit and used exclusively for religious worship, for schools and colleges, for purposes purely charitable, or for agricultural and horticultural societies may be exempted from taxation by general law. All laws exempting from taxation property other than the property enumerated in this article, shall be void."
(Emphasis added)

Article III, Section 43 provides in part:

. . . No tax shall be imposed on lands the property of the United States; . . .

Implementing the constitutional provisions of Section 6, Article X, is Section 137.100, RSMo, which provides:

The following subjects are exempt from taxation for state, county or local purposes;

(1) Lands and other property belonging to this state;

(2) Lands and other property belonging to any city, county or other political subdivision in this state, including market houses, town halls and other public structures, with their furniture and equipments and on public squares and lots kept open for health, use or ornaments;

(3) Nonprofit cemeteries;

(4) The real estate and tangible personal property which is used exclusively for agricultural or horticultural societies organized in this state;

(5) All property, real and personal actually and regularly used exclusively for religious worship, for schools and colleges, or for purposes purely charitable and not held for private or corporate profit, except that the exemption herein granted does not include real property not actually used or occupied for the purpose of the organization but held or used as investment even though the income or rentals received therefrom is used wholly for religious, educational or charitable purposes.

These provisions contemplate two separate kinds of real property which is exempt from taxation. The first is based on ownership--"property of" or "belonging to" the United States, Missouri, or political subdivisions thereof. The second depends on the use to which a property is put--property not held for private or corporate profit and "used exclusively" for religious, educational, or charitable purposes.

We are of the opinion that a life estate in real property leased to the University by a private individual is not "property of" nor does it "belong to" the University. This is true regardless of the use to which it is put by the lessee. In this regard you are referred to Baldwin v. Board of Tax-Roll Corrections, 331 P.2d 412 (Okla. 1958); and United States v. Tax Commission of City of New York, 254 N.Y.S.2d 785 (1964).

Therefore, the determination of the tax exempt status of this real estate hinges upon whether it is being used in such a way as to be exempt from taxation if not held for private or corporate profit. The applicable use exemption is that exempting property "used exclusively" "for school and colleges" and actually used for school purposes. We do not have available information as to what use the University of Missouri is putting the property to which it has been given access via the lease. We shall assume the property is being "exclusively used" by the University for school purposes.

Assuming, then, that the real estate in question is being "used exclusively" by the University for school purposes the further determination must also be made as to whether it is also "not held

for private or corporate profit." In making the tax exempt status of real estate in question to depend upon whether the lessor derives a benefit from the lease thereof, we are guided by the leading Missouri case of State ex rel Hammer v. Macgurn, 187 Mo. 238, 86 S.W. 138 (1905). That case involved a lease by a private individual to a school board of real estate to be used for school purposes. Such lease provided for a nine hundred dollars annual rental. The Missouri Supreme Court construed §9119, RSMo 1889, the predecessor of §137.100, RSMo 1959. The former section was couched solely in terms of use and did not include the phrase "not held for private or corporate profit." However, the court reached the same conclusion as prompted by the present wording of the statute, via a determination that property was not being exclusively used for educational purposes when the lessor thereof derives a gain or profit. We quote:

. . . So, if the private owner of the land allows his land to be used for such purposes, and charges no rent, and derives no personal benefit from the land, the land is exempt from taxation, because the land is then devoted exclusively to such a use. This was the case in City of Louisville v. Werne (Ky.) 80 S.W. 224, relied on by the defendants. For in such cases the owner contributes the use of his land to public or quasi public use, or to such a use as the Constitution contemplates, and derives no gain or profit for himself, and therefore the state does not exact a tax from his land with one hand while accepting a contribution of the use of his land with the other hand. But, on the contrary, when the owner leases his land to the public for a public use, or to a quasi public body for a charitable or religious use, and applies the rents derived he contributes nothing to the public or to charity, he loses nothing by the use, he is not a benefactor to any one, but he stands before the law in exactly the same light as any one else who leases his land for any other purpose, and uses the rents for his own advantage, and therefore he is not entitled to any special consideration at the hands of the law or the government, and his property is not exempt. There would be just exactly as much, and no more or less, reason for holding that the property of one who sold provisions or supplies to a charitable institution, which were used

Honorable John W. Briscoe

to support the lives of the inmates thereof, was exempt from taxation. In both cases he would get and appropriate to his own use the proceeds or products of his property, just the same as if it has been rented, or sold to a private citizen, or to a business concern; and in neither instance would the state or the charitable institution be benefited one jot or tittle by the transaction, for it would pay a full consideration for all it got. 86 S.W. at 139.

We have concluded that the exempt status of the real estate in question directly depends on the rent provisions of the lease arrangement. If the University of Missouri pays no, or only nominal rent, as for example \$1 per year, the educational use exemption is available. Ross v. City of Long Beach, 138 P.2d 394 (Cal.App. 1943), aff'd 24 Cal.2d 258, 148 P.2d 649 (1944); City of Louisville v. Werne 25 Ky.L.Rep. 2196, 80 S.W. 224 (1904). If, on the other hand, the University pays other than nominal rent, the use is not exclusively educational and the property is held for private profit. State ex rel Hammer v. Macgurn, supra. See also Annot., 157 A.L.R. 868-872 (1945). From that annotation, the following language is to be found re statutes, such as presently in force in Missouri, excepting for use exemptions property held for a profit:

In some instances the constitutional or statutory provision exempting property used for beneficent purposes from taxation is followed by a clause by which property leased for such purposes and for which the owner receives rent is expressly excepted from exemption. The test under this type of statute, however, seems not to be the fact of payment of rent in itself, but whether or not such payment is used for the lessor's personal gain. Hence, where the property is leased by the lessor for profit, it is not tax-exempt, but where it is leased without profit to the lessor, it is exempt from taxation. Supra at 873.

The assessor must make the determination, guided by the authority above and in possession of all the facts, as to whether the leased property is being held for the private profit of the lessor. We must emphasize that any provision calling for other than a nominal amount of rent would benefit the lessor. This would be true even though the prospective real estate taxes would exceed the annual rent, because if the use exemption were to be applied, the rent would not be offset by taxes resulting in pure profit to the lessor.

Therefore, the parcel of real property conveyed by deed of gift to the University of Missouri, with the reservation of a life estate in the grantor which is subsequently leased to the University, is subject to taxation unless put to the exclusive use of the University of Missouri as lessee for school purposes, and unless the lease agreement does not provide for other than nominal rent payments.

If it should be determined that the real estate in question is not exempt from taxation, it remains to be considered what interest or estate in the property may be taxed or sold at a tax foreclosure.

In the first place, it is fundamental that the University of Missouri, i.e., the state, is not subject to taxation on any ownership interest (everything but the reserved life estate) it may have in the property in question. Article X, Section 6 of the Constitution of Missouri; §137.100(1), RSMo 1959. This has been held to be the case even where the property had been leased for private, profitable uses. Grand River Drainage Dist. v. Reid, 341 Mo. 1246, 111 S.W.2d 151 (1937); School Dist. of Berkeley v. Evans, 363 Mo. 208, 250 S.W.2d 499 (1952).

What remains to be determined, therefore, is the extent to which this real estate may be taxed to the individual reserving the life estate. We have concluded that the only taxable interest in this parcel of real estate is the retained life estate in the hands of the original grantor. This conclusion is prompted by the language of the Missouri Supreme Court in State ex. rel. Benson v. Personnel Housing, Inc., 300 S.W.2d 506 (Mo. 1957). That case involved a determination of the taxability of certain buildings and improvements made to real estate leased by the federal government to a private corporation under a seventy-five year lease. The Court found that the private corporation's interest in the property in question, i.e., the leasehold estate, was subject to taxation (loc. cit. 510). As is true in the case you pose, the fee simple in the Personnel Housing case was in a tax-exempt government unit. In both cases, the private entity involved owns only a limited interest--in this case a life estate and in Personnel Housing a leasehold estate. In the Personnel Housing case, the entire present value of the improvement was taxed to the private corporation because the Court determined that the anticipated useful life of such improvement was shorter than the duration of the lease (loc. cit. 509-510). The inference from the language employed in that case is clearly that only the value of the lease estate in the hands of the private entity is subject to taxation.

Honorable John W. Briscoe

In the situation you pose, an individual has conveyed the fee simple to a parcel of real estate to the University of Missouri while reserving a life estate. We believe that this is analogous to the leasehold situation in the above case. The practical effect of the transaction is as if the University had initially owned the fee and executed a lease agreement with a private individual for the duration of his natural life. As was the case with the leasehold estate in the Personnel Housing case, the private lessee's interest in the property is subject to taxation but only to the extent of his interest therein, i.e., the life estate. Such result is equitable in that the owner of the life estate should be taxed only on the property he actually owns. The real estate in question is not as valuable to a life tenant as to an owner of the fee. The life tenant may not sell the property. He cannot use the property in an abusive or destructive manner so as to decrease its value to the remainderman (waste). He cannot devise it, nor can his heirs take it by intestate succession.

Therefore, it is the opinion of this office that where certain real estate is conveyed by deed of gift to the University of Missouri with the reservation of a life estate, the vested remainder in fee simple cannot be assessed or taxed to the University because it is exempt by reason of §137.100(1), RSMo 1959; but the life estate may be valued and a tax assessed thereon to be paid by the life tenant.

It follows that since only the life estate is subject to taxation, and since the life estate is all the original grantor now owns, the interest in the property which could be sold at a tax sale is limited to a life estate pur autre vie, i.e., an estate for the duration of the original grantor's life.

Inherent in the opinion expressed above is the problem an assessor will encounter in evaluating the interest of the life tenant for purposes of tax assessment. You are referred to §§442.530 and 442.540, RSMo 1959, which set forth an applicable method of calculation. As was the case in State ex. rel. Benson v. Personnel Housing, Inc., 300 S.W.2d 506 (Mo. 1957), if there are buildings and improvements on the real estate in question in which the anticipated useful life is shorter than the life expectancy of the life tenant, their entire value is subject to taxation (loc. cit. 509-510). The statute sections referred to above set forth means of evaluating life estates based on mortality tables. It must be emphasized that these sections are not the exclusive means of ascertaining contingent values. Grayson v. Grayson, 200 Mo. App. 653, 190 S.W. 930, 931 (K.C. Ct. App. 1916). Any reasonable assessment of the life estate created by the transaction in the given case would most likely be upheld by the Missouri courts. See Bopst v. Williams, 287 Mo. 317, 229 S.W. 796, 800 (1921).

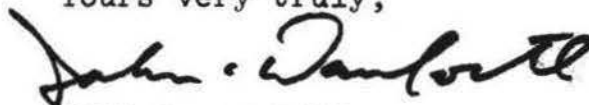
Honorable John W. Briscoe

CONCLUSION

Therefore, it is the opinion of this office that in a situation where a private individual conveys a parcel of real estate to the University of Missouri by deed of gift, reserving, a life estate in himself which is thereafter leased to the University, the life estate is exempt from taxation only if put to the exclusive use of the University for school purposes and only if the lease does not provide for other than nominal rent payments to the lessor; if not found to be exempt, only the life estate in the hands of the grantor is subject to taxation and tax sale.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Michael L. Boicourt.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being the most prominent.

JOHN C. DANFORTH
Attorney General

MOTOR VEHICLE
CRIMINAL LAW:

A motor vehicle operator who fails to stop on signal of a member of the State Highway Patrol, or otherwise willfully fails or refuses to obey any reasonable signal or direction given in the direction of traffic has committed a moving violation and should have two points assessed against his driving record by the Director of Revenue.

January 9, 1970

OPINION NO. 68

Mr. James E. Schaffner
Acting Director of Revenue
Department of Revenue
Jefferson Building
Jefferson City, Missouri 65101



Dear Mr. Schaffner:

This is in response to your request for an opinion on the following questions:

- "a. Is a failure or refusal of a motor vehicle operator or driver to stop on signal, or otherwise fail or refuse to obey any other reasonable signal or direction of a member of the State Highway Patrol given in directing the movement of traffic on the highways, a moving violation as contemplated under the provisions of Section 302.302, RSMo.?
- "b. If the above described offense is considered a moving violation, should 2 points be assessed against the driver record of an offender convicted of that offense?"

The pertinent provisions of Section 302.302, RSMo Supp. 1967 are as follows:

- "1. The director of revenue shall put

Mr. James E. Schaffner

into effect a point system for the suspension and revocation of chauffeurs' and operators' licenses. Points shall be assessed only after a conviction or forfeiture of collateral. The initial point value is as follows:

(1) Any moving violation of a state law or county or municipal traffic ordinance not listed in this section, other than a violation of vehicle equipment provisions.... 2 points . . . "

A moving violation is defined in Section 302.010 (10), RSMo Supp. 1967 as:

" . . . that character of traffic violation where at the time of violation the motor vehicle involved is in motion, except that the term does not include the driving of a motor vehicle without a valid motor vehicle registration license, or violations of sections 304.170 to 304.240, RSMo, inclusive, relating to sizes and weights of vehicles;"

To determine whether a violation of Section 43.170, RSMo 1959, which reads:

"It shall be the duty of the operator or driver of any vehicle or the rider of any animal traveling on the highways of this state to stop on signal of any member of the patrol and to obey any other reasonable signal or direction of such member of the patrol given in directing the movement of traffic on the highways. Any person who willfully fails or refuses to obey such signals or directions or who willfully resists or opposes a member of the patrol in the proper discharge of his duties shall be guilty of a misdemeanor and on conviction thereof shall be punished as provided by law for such offenses."

is a "moving violation," one must first determine whether a violation of that section would be a "traffic" violation. The phrase "traffic violation" is not defined in the statutes

Mr. James E. Schaffner

and has not received judicial interpretation.

We note from Section 43.025, RSMo 1959, that " . . . the primary purpose of the highway patrol is to enforce the traffic and promote safety upon the highways." We, therefore, are of the opinion that in the event Section 43.170 is violated by a person operating a motor vehicle; such person has committed that character of traffic violation which under the statutes is a moving violation subject to the provisions of Section 302.302, RSMo 1959. Because Section 302.302, RSMo Supp. 1967 does not make specific mention of that offense, two points should be assessed against the offender pursuant to Section 302.302--(1), RSMo Supp. 1967.

CONCLUSION

It is the opinion of this office that a motor vehicle operator who fails to stop on signal of a member of the State Highway Patrol, or otherwise willfully fails or refuses to obey any reasonable signal or direction given in the direction of traffic has committed a moving violation and should have two points assessed against his driving record by the Director of Revenue.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Charles A. Blackmar.

Very truly yours,



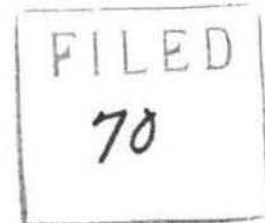
JOHN C. DANFORTH
Attorney General

(Answer by Letter) Patten

January 19, 1970

OPINION LETTER NO. 70

Honorable William S. Brandom
Prosecuting Attorney
Clay County Courthouse
Liberty, Missouri 64063



Dear Mr. Brandom:

This letter is in response to your request for an opinion on the question of whether or not certain employees of a railroad company who drive vehicles belonging to their employer must have chauffeur's licenses. The facts of the particular case in question involve employees of a railroad company who are employed as mechanics and laborers, and who operate company vehicles on intermittent occasions when repairs of railroad tracks or repairs on a stalled engine are required. No one man drives the vehicles all of the time and there is no pattern as to who will drive, other than those who are available at the time the emergency arises. Selection of the drivers is a hit-or-miss matter. The employees in question receive no extra pay for driving to the repair site. Your questions were posed as to whether an employee would need a chauffeur's license if he drove one day in a month, five days in a month or ten days in a month. As will be seen from the following discussion, this office does not consider it relevant as to how many days an employee might drive in any particular month in determining whether or not that employee needs a chauffeur's license. Therefore, this opinion will cover the facts presented in your opinion request and will not hypothesize as to facts concerning how many days in a particular month a given employee might drive a company owned vehicle before needing a chauffeur's license.

Section 302.010, sub 1, defines chauffeur as follows:

"'Chauffeur', an operator who operates a motor vehicle in the transportation of persons or property, and who receives compen-

Honorable William S. Brandom

sation for such services in wages, salary, commission or fare; or who as owner or employee operates a motor vehicle carrying passengers or property for hire; or who regularly operates a commercial motor vehicle of another person in the course of or as an incident to his employment, but whose principal occupation is not the operating of such motor vehicle; . . ."

Enclosed is a copy of Attorney General's Opinion No. 227, dated August 5, 1964, issued to the Honorable Bill D. Burlison, which held that a sheet metal worker is not required to have a chauffeur's license to operate his employer's trucks if the trips are so occasional and infrequent that they are not part of the employee's regular duties. It is our opinion that Opinion No. 227 applies here and therefore, the railroad employees involved here do not have to obtain chauffeur's licenses. This opinion holds true no matter how many days in any particular month the employees drive the railroad company's trucks, the crucial determination not being how many days the truck or vehicle is driven by the employee but rather whether the driving of the vehicle is a "regular" part of the employee's duties. If one of the railroad employees were assigned to the duty of always driving the vehicles in question, or if the driving of the vehicles was rotated among the employees on a set schedule, then chauffeur's licenses would be required because the employees would be "regularly" driving the employer's vehicles in the course of the employer's business.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosure:

Opinion No. 227, Burlison, August 5, 1964

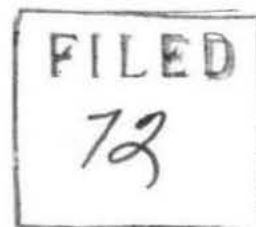
SCHOOLS:
STATE AID:

1. Pursuant to subparagraph 9 of Section 163.031, V.A.M.S., a school district must spend for teachers' salaries in the year in which the money is received at least eighty percent of all state school funds received pursuant to Section 163.031 unless exempted from such requirement by the State Board of Education. 2. Pursuant to Section 163.061, RSMo Supp. 1967, a school district must place at least eighty percent of all state school moneys received under Sections 1, 2 and 3 of Section 163.031 in the teachers' fund and the balance, if any, in the incidental fund. 3. The only restriction placed by subparagraph 9 of Section 163.031 on a school board's discretion in setting a levy under Section 164.011 is that the district must spend on teachers' salaries in the current year as much of the revenue produced by local tax levies as was spent for that purpose in the previous year. 4. The State Board of Education is responsible for the enforcement of subparagraph 9 of Section 163.031.

OPINION NO. 72

March 3, 1970

Honorable Jack J. Schramm
State Representative, District 37
7529 Gannon Avenue
University City, Missouri 63130



Dear Representative Schramm:

This letter is in response to your request for an official opinion of this office on the following questions pertaining to subsection 8 of Section 163.031 of House Committee Substitute for Senate Substitute for Senate Bills 1, 185 and 215 (enacted in 1969 by the 75th General Assembly) (hereinafter referred to as subsection 9 of Section 163.031, V.A.M.S.):

"1. Must a school district spend a minimum of 80% of the allotted state money for the school year 1969-1970, over and above that allocated for 1968-1969, for teachers salaries in the school year 1969-1970?

"2. Could a school district put this additional amount in their balances (reserves) if 80% of all state aid, including the increase, is spent for teachers salaries?

"3. Can this additional state money be used to reduce tax levies for the following fiscal year? Were school districts in violation of

Honorable Jack J. Schramm

this provision when, in the spring and summer of 1969, they reduced their levies in anticipation of this additional revenue?

"4. Which agency or group enforces the provisions of this act? ('In the event a district fails to comply ... deducted ... (unless) exemption.')

Subsection 9 of Section 163.031, V.A.M.S., states as follows:

"9. A school district shall spend for teachers' salaries each year at least eighty percent of the state school funds received under this section that year as provided by section 163.061 and as much of the revenue produced by local tax levies as was spent for teachers' salaries the previous year. In the event a district fails to comply with this provision, the amount by which the district fails to spend funds as provided herein shall be deducted from the district's apportionment for the following year provided that the state board of education may exempt a school district from this provision if the state board of education determines that circumstances warrant such exemption."

I.

The first sentence of subparagraph 9 of Section 163.031 reads as follows:

"A school district shall spend for teachers' salaries each year at least eighty percent of the state school funds received under this section that year as provided by section 163.061 . . ." (Emphasis Supplied)

We believe that the legislature clearly intended by this language that a school district must spend in the year in which it is received at least eighty percent of all state school funds received pursuant to Section 163.031.

II.

Section 163.061, RSMo Supp. 1967, reads as follows:

Honorable Jack J. Schramm

"163.061. Allocation of state aid to district funds.--Not less than eighty per cent of the state school moneys received under the provisions of subsections 1, 2 and 3 of section 163.031 shall be placed in the teachers' fund and the remaining per cent of such moneys in the incidental fund."

Pursuant to Section 163.061 a school district must put at least eighty percent of all state school moneys received pursuant to Sections 1, 2 and 3 of Section 163.031 in the teachers' fund and, as pointed out above, must spend that money for teachers' salaries in the year it is received. The percentage, if any, remaining after at least eighty percent of the state moneys have been placed in the teachers' fund shall be placed in the incidental fund. Section 163.061. Whether any of the money placed in the incidental fund would become part of the reserves (surplus) of the school district at the end of the school year would depend upon whether the expenditures from the incidental fund were less than the total amount placed in the fund during the year.

III.

Reference is made again to the first sentence of subparagraph 9 of Section 163.031 which reads as follows:

"A school district shall spend . . . as much of the revenue produced by local tax levies as was spent for teachers' salaries the previous year. . . ." (Emphasis Supplied)

The intent of the legislature as reflected by this provision is that increased state aid will not be used by the school districts to reduce the amount of money raised by local tax levies which had been spent on teachers' salaries.

Pursuant to Section 164.011, RSMo Supp. 1967, the school board of each district shall annually prepare an estimate of the amount of money to be raised by taxation and the rate required to produce the amount ". . . specifying by funds the amount and rate necessary to sustain the school or schools of the district for the ensuing school year, . . ." If a school board does not violate the restriction contained in the first sentence of subsection 9 of Section 163.031, which is quoted in the preceding paragraph, this subsection would not otherwise affect the board's discretion under Section 164.011 to set its levy.

IV.

Honorable Jack J. Schramm

The last sentence of subsection 9 of Section 163.031 reads as follows:

" . . . In the event a district fails to comply with this provision, the amount by which the district fails to spend funds as provided herein shall be deducted from the district's apportionment for the following year provided that the state board of education may exempt a school district from this provision if the state board of education determines that circumstances warrant such exemption."

The State Board of Education is given the responsibility of apportioning state aid pursuant to paragraphs 1, 2 and 3 of Section 163.031. See Section 163.081(2). Furthermore, the State Board of Education is given the discretionary power to exempt districts from the restriction of subparagraph 9 of Section 163.031. See last sentence of paragraph 9 quoted above. Therefore, we believe that the State Board of Education is the agency which is given the responsibility by the legislature of enforcing compliance with the first sentence of subparagraph 9 of Section 163.031.

We are advised by the State Department of Education that its school finance section will review the receipts and expenditures shown on the annual report of the secretary of the board to determine whether each district is in compliance with Section 163.031 and will also instruct school auditors to check this requirement at the time the district audit is made as required by Section 165.-121, RSMo Supp. 1967.

CONCLUSION

Therefore, it is the opinion of this office that:

1. Pursuant to subparagraph 9 of Section 163.031, V.A.M.S., a school district must spend for teachers' salaries in the year in which the money is received at least eighty percent of all state school funds received pursuant to Section 163.031 unless exempted from such requirement by the State Board of Education.
2. Pursuant to Section 163.061, RSMo Supp. 1967, a school district must place at least eighty percent of all state school moneys received under Sections 1, 2 and 3 of Section 163.031 in the teachers' fund and the balance, if any, in the incidental fund.
3. The only restriction placed by subparagraph 9 of Section 163.031 on a school board's discretion in setting a levy under

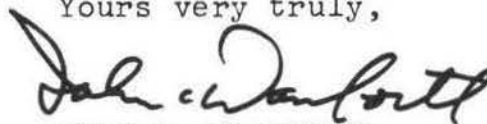
Honorable Jack J. Schramm

Section 164.011 is that the district must spend on teachers' salaries in the current year as much of the revenue produced by local tax levies as was spent for that purpose in the previous year.

4. The State Board of Education is responsible for the enforcement of subparagraph 9 of Section 163.031.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, D. Brook Bartlett.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being more prominent.

JOHN C. DANFORTH
Attorney General

TAXATION:

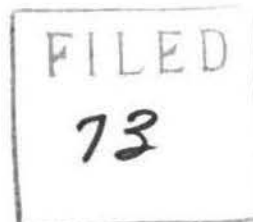
COUNTY COLLECTOR:

1. A county collector is required to issue a receipt for taxes paid under protest as provided for in Section 139.031, Senate Bill 39, 75th General Assembly, which receipt shall state that the tax is paid under protest; 2. When a tax is paid under protest as provided in Section 139.031, on or before the due date thereof, no penalties can be assessed or collected even though the time for filing suit for recovery of the protested tax does not expire until after the end of the calendar year in which the tax was paid.

January 9, 1970

OPINION NO. 73

Honorable Joe D. Holt
State Representative
District 102
829 Center Avenue
Fulton, Missouri 65251



Dear Mr. Holt:

This official opinion is rendered in response to the request contained in your recent letter relative to Senate Bill No. 39, 75th General Assembly.

In particular, your letter raises the following questions:

"1. When tax money is presented to the collector under the provisions of this law and with the proper document showing that the money is presented in protest, does the county tax collector give the person so presenting the money a tax receipt stamped and marked paid as if he had paid the taxes in full in the normal fashion?

"2. If after the 90-day period has expired following payment of the taxes under protest and during that period of time January 1, 1970, or January 1 or any ensuing year has arrived and passed, what effect does this section have upon the effect of collection of penalties normally assessed when taxes are not paid by January 1?"

Senate Bill No. 39 adds to Chapter 139, Missouri Revised Statutes entitled "Payment and Collection of Current Taxes", a new section to be known as Section 139.031, authorizing the payment of taxes under

Honorable Joe D. Holt

protest and providing procedures for the recovery of taxes erroneously or illegally collected.

Literally, the bill is drafted in five sections. Section 1 authorizes payment of taxes under protest and sets forth certain requirements for making such protest. Section 2 relates to the handling of tax money by the collectors and authorizes the filing of lawsuits in the circuit courts for recovery of taxes paid under protest. Section 3 relates to the type of court proceedings and the relief to be granted by the court. Section 4 makes provision for the refund of taxes "mistakenly or erroneously" paid, and Section 5 states that no interest shall be paid on refunds.

The language of the statute is as follows:

"Section 1. Any taxpayer may protest all or any part of any taxes assessed against him, except taxes collected by the Director of Revenue of Missouri. Any such taxpayer desiring to pay any taxes under protest shall, at the time of paying such taxes, file with the collector a written statement setting forth the grounds on which his protest is based, and shall further cite any law, statute, or facts on which he relies in protesting the whole or any part of such taxes.

"Section 2. The collector shall disburse to the proper official all portions of taxes not so protested, and he shall impound in a separate fund all portions of such taxes which are so **protested**. Every taxpayer protesting the payment of taxes, within ninety days after filing his protest, shall commence an action against the collector by filing a petition for the recovery of the amount protested in the Circuit Court of the county in which the collector maintains his office. If any taxpayer so protesting his taxes shall fail to commence an action in the Circuit Court for the recovery of the taxes protested within the time herein prescribed, such protest shall become null and void and of no effect, and the collector shall then disburse to the proper official the taxes impounded, as hereinabove provided.

"Section 3. Trial of the action in the Circuit Court shall be in the manner prescribed for non-jury civil proceedings, and, after determination of the issues, the court shall make such orders as may be just and equitable to refund to the taxpayer all or any part of the taxes paid under protest or to authorize the collector to release and disburse all or any part

Honorable Joe D. Holt

of the impounded taxes. Either party to the proceedings may appeal the determination of the Circuit Court.

"Section 4. All county collectors of taxes, and the collector of taxes in any city not within a county, shall, upon written application of a taxpayer, refund any real or tangible personal property tax mistakenly or erroneously paid in whole or in part to the collector. Such application shall be filed within one year after the tax is mistakenly or erroneously paid. The County Court, or other appropriate body or official, shall make available to the collector funds necessary to make refunds under this subsection by issuing warrants upon the fund to which the mistaken or erroneous payment has been credited, or otherwise.

"Section 5. No taxpayer shall receive any interest on any money paid in by him either erroneously or under protest."

There is nothing new or unique about statutes authorizing payment of taxes under protest and suits for refund of taxes so paid. A number of states have such statutes and it has been held that the effect is to make the payment of an illegal tax under protest involuntary, irrespective of any question of compulsion or duress within the rules of the common law. Also such payment has the effect of impressing with a trust the unlawfully collected taxes. Furthermore, a tax is paid when it is properly paid under protest. 84 C.J.S., Taxation, Section 638.

There is nothing in Section 139.031 (Senate Bill No. 39) indicating what type of receipt, if any, shall be issued by collectors receiving payment under protest. However, Section 139.090, RSMo 1959, states in part:

"1. Whenever any person shall pay taxes charged on the tax book, the collector shall enter such payment in his list, and give the person paying the same a receipt, specifying the name of the person for whom paid, the amount paid, what year paid for, and the property and value thereof on which the same was paid, according to its description on the collector's list, in whole or in part, as the case may be, and the collector shall enter 'paid' against each tract or lot of land when he collects the tax thereon."

Thus, it is clear that a receipt must be given whenever taxes are paid. It is our view that this requirement applies to payment under protest as well. The collector's receipt should contain the information expressly mentioned in the statute and should state that the tax has been paid under protest.

Honorable Joe D. Holt

The second question presented by your letter presupposes that a tax is paid under protest prior to the end of the calendar year although the ninety day period within which a suit for recovery may be filed does not expire until after December 31. As indicated above, it is our view that the tax is paid when it is paid under protest. Inasmuch as this occurs before the end of the year, there is no delinquency and no basis for imposing or collecting penalties.

CONCLUSION

Therefore, it is the opinion of this office that: 1. A county collector is required to issue a receipt for taxes paid under protest as provided for in Section 139.031, Senate Bill No. 39, 75th General Assembly, which receipt shall state that the tax is paid under protest; 2. When a tax is paid under protest as provided in Section 139.031, on or before the due date thereof, no penalties can be assessed or collected even though the time for filing suit for recovery of the protested tax does not expire until after the end of the calendar year in which the tax was paid.

The foregoing opinion, which I hereby approve, was prepared by my assistant John E. Park.

Very truly yours,



JOHN C. DANFORTH
Attorney General

January 12, 1970

OPINION LETTER NO. 75

Answered by L. J. Gardner

Honorable Phillip H. Snowden
State Representative - 86th District
313 Armour Road
North Kansas City, Missouri 64116



Dear Representative Snowden:

This is in reply to the questions raised in your letter of December 4th concerning Senate Bill No. 117 which was enacted by the Seventy-Fifth General Assembly and, as pointed out in your letter, made substantial changes in the laws relating to Architects and Professional Engineers.

This bill did not contain an emergency clause and, as indicated in your letter, it went into effect October 13, 1969.

Therefore, the examination that was given September 8th through September 11, 1969, was subject to the provisions of the prior law, including Section 327.070, RSMo 1959, which in paragraph 2 provided "Disabled veterans of the armed forces of the United States shall be given a credit of ten points in all examinations". Any person who was a "disabled veteran of the armed forces of the United States" was entitled to a credit of ten points on all examinations given on such dates.

We understand that, as stated in your letter, there were seven separate examinations given September 8th through September 11, 1969. A disabled veteran of the armed forces of the United States was entitled to ten points on all examinations given on such dates.

Very truly yours,

JOHN C. DANFORTH
Attorney General

BONDS:
SCHOOLS:
CITIES, TOWNS & VILLAGES:
INTEREST:

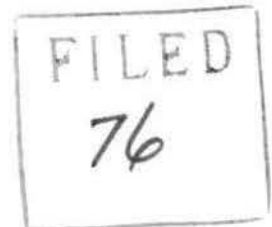
1. House Bill No. 2 invalidates contracts entered into prior to the effective date of said bill which call for the private sale of bonds by a school district in which the

interest rate will exceed six percent where such bonds had not been issued as of the effective date of said bill. 2. A contract entered into prior to the effective date of House Bill No. 2 between a city and a private party calling for the sale of bonds with an interest rate of six percent or less, subject to an escalation in the event of a rise in the Dow-Jones Bond Index or a similar national bond yield index, is invalid when the effect of the escalation clause would result in the issuance of bonds at private sale with an interest rate in excess of six percent subsequent to the effective date of House Bill No. 2. 3. "Reasonable notice," as the term is used in House Bill No. 2, constitutes that notice which is reasonably calculated to inform the general public that bonds with interest rates in excess of six percent are to be offered at public sale.

OPINION NO. 76

March 2, 1970

Honorable William C. Phelps
State Representative, District 4
5016 Grand
Kansas City, Missouri 64112



Dear Representative Phelps:

This is in response to your request for an opinion concerning the effect of House Bill No. 2, as enacted and passed by the First Extraordinary Session of the 75th General Assembly. Specifically, your request entailed the following questions:

1. Does House Bill No. 2 invalidate a contract entered into prior to the effective date of said bill for the private sale of bonds by a school district in which the interest rate will exceed six percent?
2. Does House Bill No. 2 invalidate a contract entered into prior to the effective date of said bill for the private sale of bonds by a city in which the interest rate by reason of an escalation clause will exceed six percent?
3. What constitutes "reasonable" notice of public sale within the meaning of House Bill No. 2?

Honorable William C. Phelps

I.

With respect to your first question, you have informed us that several school districts had entered into contracts prior to the effective date of House Bill No. 2 for the private sale of bonds by a school district in which the interest rate would exceed six percent, said contracts calling for the issuance and deliverance of bonds after the effective date of House Bill No. 2. Under the existing law prior to the effective date of House Bill No. 2, school districts could issue bonds at private sale with a maximum rate of interest of eight percent. See Attorney General Opinion No. 436, dated October 9, 1969. (copy attached). However, House Bill No. 2, which became effective ninety days after adjournment of the First Extraordinary Session (Attorney General Opinion No. 454, November 4, 1969, copy attached), provides that ". . . any and all bonds including revenue bonds hereafter issued under any law of this state by any . . . school district, . . . shall be negotiable and may bear interest at a rate not exceeding six percent per annum, . . . anything in any proceedings heretofore had authorizing such bonds or in any law in this state to the contrary notwithstanding. Such aforementioned bonds may bear interest at a rate not exceeding eight percent per annum if sold at public sale after giving reasonable notice of such sale, . . ." It is clear from the language of House Bill No. 2 that the legislature did not intend to allow school districts to issue bonds at private sale subsequent to the effective date of House Bill No. 2 at interest rates exceeding six percent. House Bill No. 2 specifically provides that bonds issued subsequent to the effective date of said bill must be sold at public sale after giving reasonable notice of such sale if they bear interest at a rate exceeding six percent with a maximum rate of eight percent. Therefore, any bond bearing interest in excess of six percent issued by a school district subsequent to the effective date of House Bill No. 2 must be sold at public sale after giving reasonable notice of such sale, regardless of any contractual arrangements to the contrary.

The question arises as to the constitutionality of the above requirements of House Bill No. 2 in view of the impairment of contract clauses of both the United States Constitution and the Missouri Constitution, Article I, Section 10 of the Constitution of the United States and Article I, Section 13, Mo.Const. However, with respect to the constitutional prohibitions against impairment of contract, it has been said that ". . . the State . . . continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end 'has the result of modifying or abrogating contracts already in effect.' . . ." Home Building & Loan Association v. Blaisdell, 290 U.S. 398, 434-435, 78 L.Ed. 413, 54 S.Ct. 231 (1934). For additional discussion on this point, see 16 C.J.S., Constitutional Law, Section 281, page

Honorable William C. Phelps

1284 and the cases cited therein. "The economic interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts. . . ." Home Building & Loan Association v. Blaisdell, Id. at 437. Since bond issues by the various political subdivisions of this state are necessary in order to build and maintain public utilities and services necessary to the health, safety, and well-being of the citizens of this state, legislation on the subject of bonds comes within the meaning of the term "police power."

"In the exercise of this great lawmaking function, the state is not obstructed by a contract between one of its agencies (cities, towns, or villages) and other persons, for the reason that the state cannot alienate any of its sovereign powers which are necessary to the public welfare, or essential to the protection of the health, morals, and property of its citizens. . . ." Southwest Missouri R. Co. v. Public Service Commission, 281 Mo. 52, 219 S.W. 380, 382 (en banc 1920)

In applying this principle, it has been said that the Public Service Commission in Missouri has the power to set rates for a utility and that these rates shall prevail over rates established previously by private contract even though said rates are contrary to the ones established by private contract. See Kansas City Power & Light Company v. Midland Realty Co., 338 Mo. 1141, 93 S.W.2d 954, 958 (1936), *aff'd* 300 U.S. 109, *reh den* 300 U.S. 687. See also Metropolitan Funeral System Ass'n. v. Forbes, 331 Mich. 185, 49 N.W.2d 131, 136 (1951), wherein the Supreme Court of Michigan, in dealing with a statute regulating participation by life and accident insurance companies in the mortuary business, said:

"The legislature, acting within the limits of its power, has enacted legislation which will lead to the termination of the employment contracts between the plaintiff and many of its employees. It has also modified the plaintiff's insurance contracts to the extent that money alone can be paid to the beneficiaries thereunder. The legislature passed corrective legislation to prevent an evil. That many contracts were altered or made unenforceable is of no consequence for no constitutional inhibition has been violated."

Therefore, it is our opinion that those provisions of House Bill No. 2 which abrogate contracts in effect at the time said act

Honorable William C. Phelps

became effective do not involve impairment of contract in the constitutional sense.

II.

In your second question, you ask if House Bill No. 2 would invalidate a contract entered into prior to the effective date of said bill for the sale of bonds by a city, said contract containing an escalation clause by which the interest rate could exceed six percent. You state that a number of cities have entered into such contracts with a fixed interest rate of six percent or less with the interest rate subject to escalation in the event of a rise in the Dow-Jones Index or a similar national bond yield index. You state that a number of cities having such contracts now wish to issue and deliver their bonds with an interest rate in excess of six percent at private sale. Since House Bill No. 2 requires a public sale of bonds by a city if the interest rate exceeds six percent, the question arises as to whether there has been an unconstitutional impairment of the above contracts by said bill.

In answer to this, it is only necessary to consider the contracts themselves. A contract entered into between a city and another party for the private sale of city bonds at an interest rate of six percent with an escalation clause calling for increased interest rates on the happening of a given event is, at least to the extent of the escalation clause, invalid. Section 108.170, RSMo Supp. 1967, which section was in effect prior to the passage of House Bill No. 2, provided that interest rates on bonds issued by cities should not exceed six percent. Therefore, escalation clauses in contracts entered into during the period of time that this section was in effect which provided for interest rates in excess of six percent are simply invalid. Likewise, a contract of this nature entered into subsequent to the effective date of House Bill No. 2 would be invalid in that House Bill No. 2 requires public sale of city bonds where the interest rate exceeds six percent. "As a general rule, a valid and enforceable contract may not arise out of a transaction prohibited by statutory law. . . ." Greer v. Zurich Insurance Company, 441 S.W.2d 15, 26 (Mo. 1969).

III.

In your third question, you ask what constitutes "reasonable notice" of public sale as called for by House Bill No. 2. You point out that no guidelines are given in House Bill No. 2 as to what constitutes reasonable notice. It has been said that ". . . Reasonable notice is defined to be such notice or information of a fact as may fairly and properly be expected or required in the particular circumstances. . . ." State v. Aronson, 330 S.W.2d 140, 144 (St.L.Ct.App. 1959). No hard and fast rule can be laid down

Honorable William C. Phelps

in this area. Certainly, any political subdivision desiring to issue bonds with an interest rate in excess of six percent should take whatever steps are necessary in order to inform the public that such bonds will be sold at public sale. In addition, notice could be sent directly to those who customarily buy such bonds, i.e., municipal bond dealers or banks with municipal bond departments in order to insure a successful sale.

CONCLUSION

Therefore, it is the opinion of this office that:

1. House Bill No. 2 invalidates contracts entered into prior to the effective date of said bill which call for the private sale of bonds by a school district in which the interest rate will exceed six percent where such bonds had not been issued as of the effective date of said bill.

2. A contract entered into prior to the effective date of House Bill No. 2 between a city and a private party calling for the sale of bonds with an interest rate of six percent or less, subject to an escalation in the event of a rise in the Dow-Jones Bond Index or a similar national bond yield index, is invalid when the effect of the escalation clause would result in the issuance of bonds at private sale with an interest rate in excess of six percent subsequent to the effective date of House Bill No. 2.

3. "Reasonable notice," as the term is used in House Bill No. 2, constitutes that notice which is reasonably calculated to inform the general public that bonds with interest rates in excess of six percent are to be offered at public sale.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Richard L. Wieler.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 436
10-9-69, Holman

Op. No. 454
11-4-69, Phelps

Answer by letter-Wood

May 27, 1970

OPINION LETTER NO. 77



Honorable Eugene F. Mazzuca
State Representative
Sixty-seventh District
6215 Victoria Avenue
St. Louis, Missouri 63139

Dear Representative Mazzuca:

You have asked for my opinion as to the right of abutting property owners on "unimproved" streets in the City of St. Louis to receive the same quality of street maintenance as abutting owners on "improved" streets.

You advised us that it is your understanding that an "improved street" has curbing while an "unimproved street" does not. You also stated that "improved streets" receive complete resurfacing while "unimproved streets" receive only patching.

The Director of Streets of St. Louis informs us that it is his view that an "improved street" is one which has been built according to city specifications, and, with the exception of a few major traffic arteries, is built at the expense of property owners. He states that an "unimproved street" is sub-standard and does not meet engineering requirements. The Director further advises that there are approximately one thousand miles of improved streets and one hundred miles of unimproved streets in the City. According to the Director, the Department of Streets' annual budget permits paving of thirty-two miles of street, all of which is done on improved streets, only.

We understand from the Comptroller of St. Louis that the City's annual cost for street construction and maintenance greatly exceeds the amount received from the State Motor Vehicle Fuel Tax (Article IV, Section 30(a) (2), Constitution of Missouri), the part of the expenditures in excess of the amount received from the state tax coming from city general revenue.

Honorable Eugene F. Mazzuca

The Motor Vehicle Fuel Tax remitted by the State to the City of St. Louis is:

" . . . solely for construction, reconstruction, maintenance, repair, policing, signing, lighting and cleaning roads and streets and for the payment of principal and interest on indebtedness incurred prior to the effective date of this section on account of road and street purposes, and the use thereof being subject to such other provisions and restrictions as provided by law. . . ." (Article IV, Section 30 (a) (2), Constitution of Missouri)

We are unaware of any Missouri Statute or St. Louis Charter provision making further restrictions or controls on the City's use of Motor Vehicle Fuel Tax monies. Although the Constitution provides for the allocation of these funds to the various cities on the basis of the ratio of the particular cities' population to the population of all eligible cities (Article IV, Section 30(a) (2), supra), we regard this only as a limitation on the inter-city distribution of the funds, and not as a limitation on the manner of using the funds within any particular city. We do not regard the City's use of such money for paving its "improved" streets and repairing its "unimproved" streets as violative of Article IV, Section 30(a) (2), supra.

Section 82.190, RSMo 1959 confers on constitutional charter cities " . . . exclusive control over [their] public highways, streets, avenues, alleys and public places . . . "

Article XIII, Section 13 of the Charter of the City of St. Louis provides:

"The department of streets shall have charge of the repairing, cleaning and maintenance of all public highways, streets, boulevards, alleys, bridges, wharves and levees; . . . and except as otherwise provided by law or ordinance shall have charge of the enforcement and execution of all ordinances relating to any of the matters referred to in this section"

Article XXII, Section 3 of the Charter authorizes the creation of benefit or taxing districts to pay, in whole or in part from

Honorable Eugene F. Mazzuca

special assessments in such districts, for the construction or other improvements of public highways, streets, boulevards, and alleys. Section 10 of Article XXII directs that ordinances for the "improvement" of public highways, streets, boulevards and parkways shall be paid for by special assessment of the property owners within the benefit or taxing district but permits the ordinance to provide for payment of a portion of the cost of such "improvement" by the City. "Improvement" is stated to include:

" . . . grading, regrading, preparing roadbed, placing foundation, building of super-structure, resurfacing, repaving, construction and reconstruction of curb, gutters, roadway, paving and crosswalks and intersections."

Section 13 of Article XXII requires at least one-fourth of the cost of reconstruction of any public highway, street, boulevard, parkway or alley within ten years after fully paving same to be borne by the City.

We find no other pertinent Charter provision, and in those already referred to, we find no requirement that the Department of Streets use city funds rather than special assessments to "improve" (in the sense of Article XXII, Section 10) particular streets. If a particular ordinance so provides, the Department must, of course, use City funds to pay for the portion of the street "improvement" required by the ordinance.

The Department of Streets has evidently adopted a policy of "repairing" streets that have not been "improved" within the meaning and through the procedure of Article XXII, Section 10. Section 259.010 of the Revised Code of the City of St. Louis, 1960, defines "repair" as:

" . . . to restore, any hole, depression or excavation in any street to a good, safe or sound condition after deterioration, injury, damage, dilapidation or partial destruction."

Section 259.020 of the Revised Code provides:

" . . . whenever in the opinion of the director of streets the pavement of the roadway of any improved public highway is in need of repair, the street commissioner shall cause such repairs to be made, and the cost

Honorable Eugene F. Mazzuca

thereof shall be charged to and paid
out of appropriations for current
expenses of the Street Division"

The Director of Streets is evidently "repairing" all streets and highways of the City within the limits of funds appropriated to his department.

In sum, we can find no violation of any constitutional, statutory, charter or ordinance provision by the Department of Streets of the City of St. Louis in its policy of paving only "improved streets" from City street funds.

" . . . a city may 'for its own purposes, lawfully divide its funds or allocate them in any manner it sees fit or subject its general revenue funds to particular public purposes, so long as it does not do so contrary to statute or its charter' . . . " (Automobile Club of Missouri v. City of St. Louis, 334 S.W.2d 355, 364 (Div. 2, 1960)).

An ordinance could be enacted consistent with the Charter (Article XXII, Section 10) requiring that City funds be used to pay for any portion of the cost of "improving" all city streets, but in the absence of such an ordinance, we cannot find legal fault with the present policy.

Yours very truly,

JOHN C. DANFORTH
Attorney General

LIQUOR:

INTOXICATING LIQUOR:

1. Senate Bill No. 37, 75th General Assembly, does not apply to sales of 3.2% non-intoxicating beer. 2. Senate

Bill No. 37 does not permit persons under the age of twenty-one years working in drug stores or grocery stores of the type mentioned therein to stock shelves, arrange displays, provide carry out service, or perform other tasks necessary to the exposure of intoxicating liquor for sale as such activities involve the sale or assisting in the sale or dispensing of intoxicating liquor but authorizes persons eighteen or over to accept payment for intoxicating liquor.

OPINION NO. 78

April 6, 1970

Mr. Harry Wiggins, Supervisor
Department of Liquor Control
Broadway State Office Building
Jefferson City, Missouri 65101



Dear Mr. Wiggins:

This is in response to your request for an opinion concerning the effect of Senate Bill No. 37, which was introduced during the regular 1969 legislative session and became law October 13, 1969. Specifically, you inquire whether this new law applies to the sale of 3.2% non-intoxicating beer and if the new law restricts persons between the ages of eighteen to twenty-one to the mere acceptance of money in payment of intoxicating liquor or whether such persons may otherwise assist in such sales by stocking shelves and by providing carry out service to automobiles.

Senate Bill No. 37, 75th General Assembly, as passed, reads:

"1. Except as provided in subsection 2 of this section, no person under the age of twenty-one years shall sell or assist in the sale or dispensing of intoxicating liquor.

"2. In any drug store or grocery store licensed under Section 311.200 RSMo 1959, subsections 1 and 2 where at least sixty percent of the gross sales made consists of goods, merchandise, or commodities other than intoxicating liquor in the original package, persons at least eighteen years of age may accept payment for intoxicating liquor. Delivery of intoxicating liquor away from the licensed business premises cannot be performed by anyone under the age of twenty-one years."

Mr. Harry Wiggins

As can be seen, the new law creates an exception only in the area of sales of intoxicating liquor in drug or grocery stores where at least sixty percent of the gross sales made consist of goods, merchandise, or commodities other than intoxicating liquor in the original package.

The term "intoxicating liquor" has a definite meaning in the Liquor Control Act. Section 311.020, RSMo 1959, provides the following definition:

"The term 'intoxicating liquor' as used in this chapter, shall mean and include alcohol for beverage purposes, alcoholic, spirituous, vinous, fermented, malt, or other liquors, or combination of liquors, a part of which is spirituous, vinous, or fermented, and all preparations or mixtures for beverage purposes, containing in excess of three and two-tenths per cent of alcohol by weight."

Beer with an alcoholic content of 3.2% or less is not covered by the term "intoxicating liquor," and therefore sales of such beer are not governed by the provisions of Chapter 311, but rather by the provisions of Chapter 312. Since Senate Bill No. 37 amended Section 311.300, RSMo 1959 and refers specifically to intoxicating liquor, its provisions cannot be used to regulate the sale of 3.2% non-intoxicating beer, as defined and regulated in Chapter 312.

With respect to the scope of Senate Bill No. 37, it is our opinion that said act does not allow persons under the age of twenty-one to stock shelves, arrange displays, or perform other tasks necessary to the exposure of intoxicating liquor for sale. To do so would be to violate the general provisions of subsection 1 of Senate Bill No. 37 which provides that no person under the age of twenty-one years shall sell or assist in the sale or dispensing of intoxicating liquor. Subsection 2 does not provide an exception to the general rule with respect to these particular activities, it only provides that persons of at least eighteen years of age may accept payment for intoxicating liquor.

Also, it is our opinion that subsection 2 of Senate Bill No. 37 does not create an exception to the general rule laid forth in subsection 1 with respect to carry out service as normally provided by drug or grocery stores. Enclosed is Opinion Letter No. 300, issued November 4, 1965, to the Honorable Glennon T. Moran, in which we held that carry out service involved the dispensing of intoxicating liquor and thus could not be performed by a minor. Since carry out service involves the dispensing of intoxicating liquor, it cannot be done by a minor under the provisions of Senate Bill No. 37.

Mr. Harry Wiggins

CONCLUSION

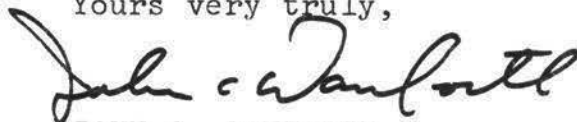
It is the opinion of this office:

1. Senate Bill No. 37, 75th General Assembly, does not apply to sales of 3.2% non-intoxicating beer.

2. Senate Bill No. 37 does not permit persons under the age of twenty-one years working in drug stores or grocery stores of the type mentioned therein to stock shelves, arrange displays, provide carry out service, or perform other tasks necessary to the exposure of intoxicating liquor for sale as such activities involve the sale or assisting in the sale or dispensing of intoxicating liquor but authorizes persons eighteen or over to accept payment for intoxicating liquor.

The foregoing opinion, which I hereby approved, was prepared by my Assistant, Richard L. Wieler.

Yours very truly,

A handwritten signature in cursive script, reading "John C. Danforth".

JOHN C. DANFORTH
Attorney General

Enclosure: Op. Letter No. 300
11-4-65, Moran

PRISONERS:
SHERIFFS:
CRIMINAL PROCEDURE:
CONVICTS:

The sheriff of the county in which an untried indictment or information is pending against a prisoner has the duty to transport

the prisoner and is to be compensated pursuant to the provisions of Section 57.290, RSMo 1969. Because of the enactment of Section 222.120, RSMo 1969, Attorney General Opinion No. 15, issued to the Honorable James D. Carter, March 23, 1956, is hereby withdrawn.

OPINION NO. 79

September 30, 1970



Mr. Howard L. McFadden
General Counsel
Department of Corrections
P. O. Box 267
Jefferson City, Missouri 65101

Dear Mr. McFadden:

This letter is issued in response to your request for an opinion concerning "... the question of whose responsibility it is to transport inmates of the Missouri State Penitentiary to court for prosecution."

Your inquiry is specifically directed as to whether the result reached in Attorney General Opinion No. 15, issued to the Honorable James D. Carter, dated March 23, 1956, has been affected by the enactment of Section 222.120, RSMo 1969. Attorney General Opinion No. 15 held that counties are not liable for costs in habeas corpus ad prosequendum cases.

Section 222.120, RSMo 1969, which was enacted subsequent to the issuance of the cited opinion, provides:

"The expense of transporting any prisoner between the place of his confinement and the county wherein the untried indictment or information is pending shall be paid by the county. It shall be the duty of the sheriff to transport the prisoner and he shall be compensated for such service as provided by section 57.290, RSMo."

Mr. Howard L. McFadden

Although Section 222.120, RSMo 1969, was enacted as a part of the Uniform Mandatory Disposition of Detainers Law, we believe that the language of Section 222.120, RSMo 1969, when considered in conjunction with Section 57.290, RSMo 1969, is sufficiently broad so as to require the sheriff to transport the prisoner between the place of his confinement and the county wherein the untried indictment or information is pending, irrespective of whether such further proceedings are initiated as a result of a request made by the inmate pursuant to the Uniform Mandatory Disposition of Detainers Law or on the initiative of the prosecuting officials.

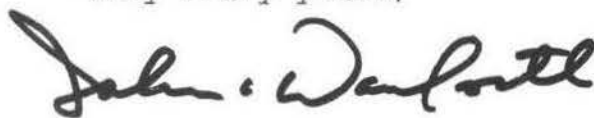
Our opinion in this regard applies only to writs issued in conjunction with further proceedings or trial with respect to untried indictments or informations and does not apply to post-conviction proceedings under Supreme Court Rule 27.26. See Attorney General Opinion No. 155, issued to the Honorable Haskell Holman, dated August 22, 1968, a copy of which is enclosed.

CONCLUSION

Therefore, it is the opinion of this office that the sheriff of the county in which an untried indictment or information is pending against a prisoner has the duty to transport the prisoner and is to be compensated pursuant to the provisions of Section 57.290, RSMo 1969. Because of the enactment of Section 222.120, RSMo 1969, Attorney General Opinion No. 15, issued to the Honorable James D. Carter, March 23, 1956, is hereby withdrawn.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Gene E. Voigts.

Very truly yours,



JOHN C. DANFORTH
Attorney General

Enclosures:

Opinion No. 15, Carter, 3/23/56 - *Withdrawn*
Opinion No. 155, Holman, 8/22/68

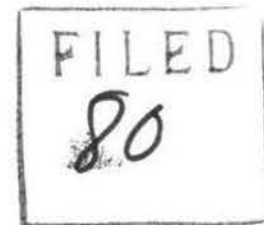
CRIMINAL PROCEDURE:
BONDS:
BAIL:

Section 56.310, RSMo 1969, which provides that a prosecuting attorney is entitled to receive ten percent of all sums collected if not more than five hundred dollars and five percent of all sums over five hundred dollars, to be paid out of the amount collected, on recognizances given to the state in criminal cases and which are or may become forfeited, applies to bail bonds as well as recognizances.

AMENDED OPINION NO. 80

August 7, 1970

Honorable Thomas R. Gilmore
Prosecuting Attorney
Scott County
217 South Kingshighway
Sikeston, Missouri 63801



Dear Mr. Gilmore:

This is in response to your request for an opinion on the question of when a prosecuting attorney is entitled to receive fees on sums collected on recognizances pursuant to Section 56.310, RSMo 1969.

Section 56.310, RSMo 1969, provides in part:

"Prosecuting attorneys shall be allowed fees as follows, unless in cases where it is otherwise directed by law: For collections on recognizances given to the state in criminal cases, and which are or may become forfeited, ten percent on all sums collected, if not more than five hundred dollars, and five percent on all sums over five hundred dollars, to be paid out of the amount collected;. . ."

The first question which your request raises is whether a distinction exists between "recognizances" and "bail bonds." Sections 544.420 through 544.660, which deal with these matters, use the two terms interchangeably. It is the opinion of this office that, while there may be some technical differences between these two terms in civil law, they are virtually indistinguishable when used in criminal law. We, therefore, believe that all bail bonds (both cash and surety) come under the meaning of Section 56.310.

Honorable Thomas R. Gilmore

A second question is whether Article IX, Section 7 of the Constitution of Missouri prohibits the payment of such fees to prosecuting attorneys. Such section provides in pertinent part:

" . . . All interest accruing from investment of the county school fund, the clear proceeds of all penalties, forfeitures and fines collected hereafter for any breach of the penal laws of the state, the net proceeds from the sale of estrays, and all other moneys coming into said funds shall be distributed annually to the schools of the several counties according to law." (Emphasis added)

It is the view of this office that the term "clear proceeds" used in the constitution should be interpreted as the net proceeds after costs and collection fees are deducted. In order to construe Section 7 of Article IX of the Constitution and Section 56.310, RSMo, so as to harmonize and be consistent with each other, we believe that when a bail bond is forfeited and proceeded upon by scire facias to final judgment and execution pursuant to Section 544.640, RSMo 1969, the fees to which a prosecuting attorney is entitled under Section 56.310, RSMo 1969, should first be paid and that the net proceeds remaining should then be applied to the county schools.

The above is supported by the case of State v. Hoeffner, 124 Mo. 492, 28 S.W. 5 (1894), which considered the above statute and constitutional provision and the court said, Mo. l.c. 497:

"It will thus appear that the people of this state have in the most solemn form set aside all fines and forfeitures as a part of the school fund, and by statute enjoined upon all prosecuting attorneys the duty of collecting these forfeitures and as an incentive to diligent service in so doing, in addition to the salaries and fees otherwise allowed by law to those officers, a commission of ten or five per cent. as the case may be is added, 'to be paid out of the amount collected.' . . ."

We would, however, point out that any fees on forfeited recognizances collected by county prosecutors would be subject to payment over to the county treasury as provided by Sections 56.320, 56.330 and 56.340, RSMo 1969.

CONCLUSION

Section 56.310, RSMo 1969, which provides that a prosecuting attorney is entitled to receive ten percent of all sums collected

Honorable Thomas R. Gilmore

if not more than five hundred dollars and five percent of all sums over five hundred dollars, to be paid out of the amount collected, on recognizances given to the state in criminal cases and which are or may become forfeited, applies to bail bonds as well as recognizances.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Dale L. Rollings.

Very truly yours,

A handwritten signature in cursive script, reading "John C. Danforth". The signature is written in dark ink and is positioned above the printed name and title.

JOHN C. DANFORTH
Attorney General

SCHOOLS:

CONSTITUTIONAL LAW:

A school district is authorized to allow the use of school premises by church or religious organizations for religious purposes during times when the use for school purposes is not required provided that a fair and adequate consideration is received for such use.

OPINION NO. 82

September 2, 1970

Honorable Richard M. Marshall
Representative 43rd District
111 South Bemiston Avenue
Clayton, Missouri 63105



Dear Representative Marshall:

This opinion is in response to your request in which you inquire whether a school district can make an agreement with an organized church allowing the church to use the school auditorium and several school classrooms for religious purposes on certain evenings in return for which the church pays a fee to the school authorities covering only the expenses of maintenance and janitorial services.

We have previously issued Opinion No. 265, dated October 30, 1969, to Ronald Reed, Jr., which held that a public school board may not allow the use of public school property by the Ministerial Alliance to conduct religious training. In that instance, there was no fee or charge paid for the use of the premises.

In our Opinion No. 158 dated August 22, 1967, to Don Witt, this office held that a public school board may allow the use of public school property by a church college or municipality for civic, social and educational purposes that do not interfere with the prime purposes of the school property and that where there is an exchange of consideration between the public school district and the church-educational institution there is no aid to religion.

In our Opinion No. 354, December 19, 1968, to Ben Morton, this office held that an agency of the state government may be authorized by the legislature to contract and cooperate with private medical schools for the purpose of training Missourians in the medical profession.

Honorable Richard M. Marshall

In our Opinion No. 81, of August 25, 1952, to Major General A. B. Sheppard, this office held that the State of Missouri may execute a "Right of Entry, Use and Occupancy" of certain buildings to the archdiocese of St. Louis for the use of the certain buildings located at Jefferson Barracks.

We have enclosed copies of the above cited opinions for your information.

The constitutional prohibitions against the support of religion are contained in several sections. Article I, Section 6, states:

"That no person can be compelled to erect, support or attend any place or system of worship, or to maintain or support any priest, minister, preacher or teacher of any sect, church, creed or denomination of religion; but if any person shall voluntarily make a contract for any such object, he shall be held to the performance of the same."

Article I, Section 7, states:

"That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship."

Article IX, Section 8, states:

"Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious

Honorable Richard M. Marshall

creed, church or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any county, city, town, or other municipal corporation, for any religious creed, church, or sectarian purpose whatever."

It is recognized that a school district is a body corporate with power to own and sell real estate. Feeler v. Reorganized School District No. 4, 290 S.W.2d 102 (Mo. 1956). It follows that the school districts have the power to allow the use of premises under their control.

When, in fact, a religious organization pays a fair consideration for the use of premises, there is no aid, support or advancement of any religious establishment. To conclude otherwise would in fact be discrimination against religious bodies which is prohibited by Section 7 of Article I of the Missouri Constitution.

We cannot speculate as to what might constitute "adequate consideration" in all circumstances. If other facilities are available in the community for rental, then the rental customarily charged for the use of such facilities would be of some assistance in determining what constitutes adequate consideration. In some instances, there might be adequate consideration if the school districts were relieved of the burden of the expenses which it would otherwise have. The decision as to what constitutes adequate consideration is vested in the district; and presumably such exercise of discretion will take into consideration all relative and available information.

If the consideration is just and adequate when all the circumstances are considered, there is no gift or subsidy to a religious organization. Kintzele v. City of St. Louis, 347 S.W.2d 695 (Mo. En Banc 1961).

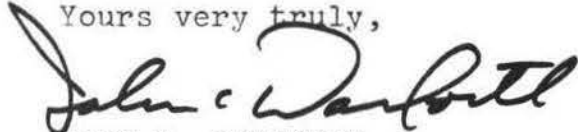
CONCLUSION

It is therefore the opinion of this office that a school district is authorized to allow the use of school premises by church or religious organizations for religious purposes during times when the use for school purposes is not required provided that a fair and adequate consideration is received for such use.

Honorable Richard M. Marshall

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being more prominent than the last name "Danforth".

JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 265
10-30-69, Reed

Op. No. 158
8-22-67, Witt

Op. No. 354
12-19-68, Morton

Op. No. 81
8-25-52, Sheppard

POLITICAL COMMITTEES:
PARTY COMMITTEES:

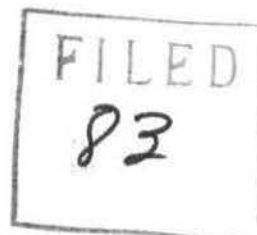
The county chairman and vice-chairman
of counties containing territory in
more than one congressional district

are not by virtue of holding such offices members of a congressional committee. It is the further opinion of this office that the township and ward committeemen and committeewomen of townships and wards which contain territory in more than one congressional district are, by virtue of such offices, members of the congressional district committee of each district which contains any part of such a ward or township.

OPINION NO. 83

January 15, 1970

Honorable Harold Dickson
State Representative
District No. 121
400 West Russell
California, Missouri 65018



Dear Representative Dickson:

You have inquired whether county chairmen and vice-chairmen and township and ward committeemen and committeewomen from a county which has townships in two separate congressional districts are members of the congressional party committees of either or both districts.

Section 120.810(4), RSMo 1959 (originally enacted L. 1953, p. 734) provides that the congressional committee of a congressional district composed in whole or in part of a part of a city or part of a county shall include as members the ward and township committeemen and committeewomen of wards and townships lying in whole or in part in the part of the city or part of the county in the congressional district.

Section 120.800, RSMo 1959, provides that the chairman and vice-chairman of a county committee shall be members of the congressional district committee of the district of which their county is a part. This provision of Section 120.800, RSMo 1959, (originally enacted L. 1949 p. 2063) antedates Section 120.810(4), RSMo 1959.

We are of the opinion that the later enacted, and more specific Section 120.810(4), must govern in the situation of a county containing territory located in more than one congressional district, and that Section 120.800 has no application to county chairmen and vice-chairmen in counties which contain territory located in more

Honorable Harold Dickson

than one congressional district insofar as congressional district committees are concerned. It is our view that only the county chairman and vice-chairman of counties wholly within a single congressional district become, by virtue of their offices, members of a congressional district committee.

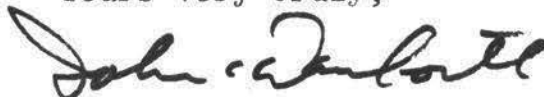
However, by the terms of Section 120.810(4), townships and wards which lie in more than one congressional district would be entitled to representation, via their committeemen and committee-women, on as many congressional district committees as there are congressional districts containing territory in such wards or townships.

CONCLUSION

It is the opinion of this office that the county chairman and vice-chairman of counties containing territory in more than one congressional district are not by virtue of holding such offices members of a congressional committee. It is the further opinion of this office that the township and ward committeemen and committee-women of townships and wards which contain territory in more than one congressional district are, by virtue of such offices, members of the congressional district committee of each district which contains any part of such a ward or township.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Louren R. Wood.

Yours very truly,



JOHN C. DANFORTH
Attorney General

ANSWER BY LETTER: ASHBY

March 6, 1970

LETTER OPINION NO. 84

Honorable Donald L. Manford
Senator-8th District
9409 Oakland
Kansas City, Missouri 64138



Dear Senator Manford:

This opinion is written responding to your question whether a labor union can enter into an agreement with a city (Independence) relative to pay and working conditions and exclude the fire chief and assistant fire chief from such contract when such city employees are members of the union.

Initially, you refer to and we desire to note a caveat that there is no agreement or contract as that term is generally understood entered into between a city and a union. We have held that the proposals adopted or modified as provided in Section 105.520, V.A.M.S. by the public body are not enforceable in a court of law and is not a contract. See *City of Springfield v. Clouse*, (Mo.) 206 S.W.2d 635 and our opinions, No. 68, dated May 6, 1966, addressed to Representative Garret, et al, and No. 373, dated October 17, 1967, addressed to the Representative Thompson (enclosed).

Under Section 105.520, V.A.M.S., the public body can adopt, modify or reject the proposed ordinance, resolution, bill or other form (of proposal). State ex rel. *Missey v. City of Cabool*, (Mo.) 441 S.W.2d 35, 41. If the governing body has this statutory authority, it seems clear to us that the governing body (in this case, a city) may exclude administrative and executive personnel (the chief and assistant chief of the fire department in this case) from the operation of their ordinances in their discretion. State ex rel. *Missey v. City of Cabool*, supra, l.c. 41.

Honorable Donald L. Manford

Whether an employee (not within the excepted group) comes within the terms and effect of any written proposals between the union and the city (in this case) depends on the ultimate action taken by the appropriate administrative, legislative or other governing body when the written, proposals in the form of an ordinance, resolution, bill or other form (of proposal) are submitted for adoption, modification or rejection under Section 105.520, V.A.M.S. If the appropriate administrative, legislative or other governing body excludes administrative and executive personnel (the fire chief and assistant fire chief) from the operation of the collective bargaining proposals as adopted, then that limited and specific class of employees are not covered by nor included in the operation of a collective bargaining proposals reduced to the form of an ordinance etc. ultimately adopted by the appropriate governing body. Accordingly, we conclude such employees (excluded by their ultimate action of the governing body on the proposals) are not covered under the ordinance, resolution, bill or other form of proposal ultimately adopted by the governing body even though they may be members of the union.

Thank you for referring the question to me, and I trust the letter explains the matter fully.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosures:

Op.No. 68, Garret, 5-6-66
Op.No. 373, Thompson, 10-17-67

CONSTITUTIONAL LAW:
GENERAL ASSEMBLY:

(1) Senate Substitute for House Joint Resolution No. 4 was passed in the form such resolution was signed by the presiding officer of each House and filed with the Secretary of State; (2) the General Assembly may reconsider and redraft a resolution already passed by the General Assembly and referred to the people before the election is held.

OPINION NO. 85

February 16, 1970

Honorable Robert L. Prange
State Senator, 14th District
Capitol Building
Jefferson City, Missouri 65101



Dear Senator Prange:

This is in response to your request for an opinion on two questions concerning Senate Substitute for House Joint Resolution No. 4 (SSHJR No. 4) passed by the Seventy-Fifth General Assembly, first session, proposing an amendment to Section 11 (c) of Article X, of the Constitution of Missouri. The question which we will answer in part I of the opinion concerns the validity of House Joint Resolution No. 4 as finally adopted in view of a discrepancy between the final version of Joint House Resolution No. 4 signed by the presiding officer of each House and the report in the Senate Journal of an amendment offered in the Senate to Senate Substitute for House Joint Resolution No. 4 (SSHJR No. 4) which became part of the final version of House Joint Resolution No. 4. The second question, which will be answered in part II of this opinion, is "whether or not the General Assembly can reconsider and redraft a resolution already passed by the General Assembly and referred to the people before it has been voted on."

I

The legislative history of Joint Resolution No. 4 reveals that on June 24, 1969, the Senate took up its Substitute for House Joint Resolution No. 4 (Senate Journal, pp. 1225-1227). At that time Senator Prange offered the following amendment:

"SENATE AMENDMENT NO.2.

Amend Senate Substitute for House Joint Resolution No. 4, page 2, section 10 (c), line 22, by adding the following after the word 'voters';

'provided that in any school district where the board of education submits a tax rate lower than the rate approved in the last previous school election and the proposed tax rate is defeated the tax rate shall not revert to the rate voted in the last previous school election but may be resubmitted to a vote of the people'

And further amend said section, line 23, by adding after the word 'Higher' the words 'or lower'

And further amend said section, line 27, by adding after the word 'higher' the words 'or lower' . . . "
[Senate Journal, p. 1226]

Extensive investigation reveals that the Senate Substitute for House Joint Resolution No. 4 (SSHJR No. 4) was not in printed form at the time Senate Amendment No. 2 was adopted by the Senate; but at that time a typed version of the Senate Substitute without amendment existed. In that typed version of the Senate Substitute there is no reference to a "Section 10 (c)." However, on the 22nd line of Section 11 (c) of SSHJR No. 4 there appears the word "voters." From the context of the Senate Substitute for House Joint Resolution No. 4 it appears that the reference in Senate Amendment No. 2 to "Section 10 (c)" was intended to be to "Section 11 (c)" and that only by reading "10 (c)" as "11 (c)" can Amendment No. 2 have any meaning at all. We further note that Senate Amendment No. 2 purports to add after the word "higher" on line 27 of the Senate Substitute for House Joint Resolution No. 4 the words "or lower." The word "higher" does not appear on line 27, but it does appear on line 26 and once again it would appear from the context of the Resolution that the amendment intended to add the words "or lower" after the word "higher" on line 26.

After Amendment No. 2 was adopted by the Senate, SSHJR No. 4, as amended, was read a third time and was passed by the Senate (Senate Journal, p. 1227).

The House passed SSHJR No. 4 (as amended with Senate Amendment Nos. 1 and 2) on June 26, 1969 (House Journal, pp. 1959-1961). We find no record that a typed or printed

Honorable Robert L. Prange

copy of SSHJR No. 4, with Senate Amendments Nos. 1 and 2, had ever been prepared at the time the House passed the House Joint Resolution No. 4 in the form it left the Senate.

On July 7, 1969, the House met and the Chairman of the House Committee on Bills Perfected and Passed reported that he had carefully examined Senate Substitute for House Joint Resolution No. 4 and found it "to be truly and correctly typed as agreed to and finally passed" (House Journal, pp. 2210-2211). Then, ". . . Senate Substitute for House Joint Resolution No. 4 [was] read at length and, there being no objection, [was] signed by the officer to the end that [it] may become law." (House Journal, p. 2212).

On July 15, 1969, the Senate Journal shows the Senate met and the President Pro Tem announced a number of bills and SSHJR No. 4 "having passed both branches of the General Assembly, would be read at length by the Secretary, and if no objections be made the bills would be signed by the President Pro Tem to the end that they may become law." The Senate Journal then shows that SSHJR No. 4 was read by the Secretary and signed by the President Pro Tem. (Senate Journal, p. 1529).

The House Journal for July 15, 1969, has the following entry on page 2222:

"Having been duly signed in open session in the Senate, Senate Substitute for House Joint Resolution No. 4 was delivered to the Secretary of State by the Chief Clerk."

We have examined the copy of SSHJR No. 4 signed by the Speaker of the House and President of the Senate and delivered to and filed with the Secretary of State. We find it incorporates Senate Amendment No. 2 as if the reference in that amendment "Section 10 (c)" was taken to read "Section 11 (c)" and the reference in the amendment to "line 27" was taken to be to "line 26".

We are of the opinion that SSHJR No. 4 was passed by the General Assembly in the form signed by the Officer of the House and the President of the Senate, notwithstanding the discrepancies between the signed version of SSHJR No. 4 and Senate Amendment No. 2, as that amendment was reported in the Senate Journal, June 24, 1969, p. 1226.

In reaching this opinion, we note the Missouri Supreme Court in Edwards v. Lesueur, 132 Mo. 410, 441, 33 S.W. 1130, 1135 (1896), held:

" . . . The provision for adopting resolutions proposing amendments is distinct from and independent of all provisions which are provided for the government of legislative proceedings. The provisions are in themselves complete, and are not in pari materia with those required in the passage of a bill. The general assembly, in proposing amendments, does not, strictly speaking, exercise ordinary legislative power. It acts in behalf of the people of the state, under an express and independent power. The mode of its exercise is prescribed, and must be observed, but the assembly is not required to look outside its power of attorney to ascertain its duty. It is only required, and it is therefore only necessary, that the vote be taken by yeas and nays, and entered in full on the journals. That this was done is not disputed."

There is no provision in the 1945 Constitution which would require the court to modify the holding in the Edwards case.

From the case of Edwards v. Lesueur, supra, we find that the legislature in passing a resolution proposing an amendment to the Constitution is not required to follow the procedures set out in the Constitution relating to the enactment of bills with respect to the number of readings the resolution must be given before final passage, the printing of the resolution, and the like. Nor does the Constitution require that the journal of each house show any of the proceedings taken regarding such a resolution.

We are of the opinion that insofar as there is a discrepancy between Senate Amendment No. 2 to SSHJR No. 4, as reported in the Senate Journal for June 24, 1969, at page 1226 and the final version of SSHJR No. 4 as signed by the presiding officer of each house, the signed version must be taken to correctly reflect the content of House Joint Resolution No. 4 as that resolution was passed by each House.

In the case of the House of Representatives we find no express rule that would apply to resolutions permitting a representative to make such an objection. However, we believe for the purposes of presenting such an objection, the House treated Joint Resolution No. 4 as if it were a bill since at the session of the House of Representatives on the day it was signed the Resolution was dealt with in all respects in a fashion similar to numerous other

Honorable Robert L. Prange

bills signed on that day. With respect to bills signed at that time, Joint Rule 6 was clearly applicable. That Rule provides in part:

"No bill shall become a law until it is signed by the presiding officer of each house in open session, who shall first suspend all other business, declare that the bill shall now be read and that if no objection be made he will sign the same. If in either house any member shall object in writing to the signing of the bill, the objection shall be noted in the journal and annexed to the bill to be considered by the governor in connection therewith. . . ."

We believe that pursuant to Joint Rule 6 an objection could have been presented with respect to SSHJR No. 4, at the time the resolution was signed by the Speaker of the House, had any member of the House of Representatives been of the opinion that the version of the bill to be signed varied in any manner from the version actually passed by the House of Representatives. We have previously noted that the House Journal, p. 221 states that there was no objection to the signing of SSHJR No. 4.

In the case of the Senate, Senate Rule 66 provides:

"All resolutions proposing amendments to the Constitution shall be treated, in all respects, in the introduction and form of proceedings on them in the Senate, in the same manner as bills; . . ."

Therefore, in the case of House Joint Resolution No. 4 any senator could have objected prior to the signing of that resolution in the Senate that it was not in substance and form the resolution actually passed by the Senate. Here, too, there was no objection to the substance or form of House Joint Resolution No. 4.

Inasmuch as no objection was presented in either House, we are of the opinion SSHJR No. 4 as signed by the presiding officer of each House was actually passed by each House.

II

You have also requested the opinion of this office as to "whether or not the General Assembly can reconsider and redraft a resolution already passed by the General Assembly and referred to the people before it has been voted on."

Honorable Robert L. Prange

We find no provisions in the Missouri Constitution or the statutes answering this question. Nor does it appear that this question has ever been answered by any Missouri court. However, based on decisions in other states, we are of the opinion that the General Assembly has the power to reconsider and redraft a resolution proposing a Constitutional amendment after that resolution has been filed with the Secretary of State, but before the proposed amendment has been voted on by the people.

The Colorado Supreme Court held by way of dictum that the General Assembly had the power at a special session to "change and amend" a resolution proposing a Constitutional amendment already approved by the General Assembly but not yet voted on by the people, In Re Senate Concurrent Resolution No. 10, 137 Colo. 491, 328 P.2d 103, 105 (1958).

In another case, the Alabama Supreme Court held that the legislature could recall for reconsideration a resolution submitting a Constitutional amendment to the people after the resolution had been delivered to the Secretary of State, In Re Opinion Of The Justices, 252 Ala. 89, 39 So.2d 665, 668 (1949).

Similarly, the Georgia Supreme Court has held the General Assembly could modify a Constitutional amendment fixing county boundaries, to change certain boundaries, after the amendment had been approved by the General Assembly and ordered submitted to the electorate, but before the actual election Clements v. Powell, 155 Ga. 278, 116 S.E. 624, 626 (1923).

We find no decisions in any state that prohibit the General Assembly from modifying a proposed Constitutional amendment after it has once been approved by the General Assembly to be submitted to the electorate, but before the election has taken place.

It should be noted that under Article III, Section 39, Constitution of Missouri, which provides:

"The general assembly shall not have power:

* * *

(7) To act, when convened in extra session by the Governor, upon subjects other than those specially designated in the proclamation calling said session or recommended by special message to the general assembly after the convening of an extra session . . ."

Honorable Robert L. Prange

the General Assembly may not act at a special session to reconsider or redraft a resolution already passed by the General Assembly unless the Governor specially designates that subject for consideration in his proclamation calling a special session or recommends that subject for consideration by a special message to the General Assembly after convening the extra session.

CONCLUSION

It is the opinion of this office that (1) Senate Substitute for House Joint Resolution No. 4 was passed in the form such resolution was signed by the presiding officer of each House and filed with the Secretary of State; (2) the General Assembly may reconsider and redraft a resolution already passed by the General Assembly and referred to the people before the election is held.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Charles A. Blackmar.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being particularly prominent.

JOHN C. DANFORTH
Attorney General

CIRCUIT CLERKS:
COMPENSATION AND FEES:
RECORDER OF DEEDS:
COURTS:

With respect to House Bill No. 119 of the 75th General Assembly (Section 50.334, V.A.M.S.), circuit clerks coming within the total compensation provisions of said bill are no longer authorized to retain the ten cents out of each bar enrollment fee allowed under Supreme Court Rule 6.04, and that circuit clerks-recorders and recorders covered by such section are not entitled to charge the fees provided for transcribing books or records belonging to the office of the recorder of deeds under Section 59.600, RSMo 1959.

OPINION NO. 88

January 19, 1970

Honorable George W. Parker
Representative, District 120
819 Crestland
Columbia, Missouri 65201



Dear Representative Parker:

This opinion is in response to your question which is as follows:

"Does House Bill 119, 75th General Assembly (regular session) in establishing a "... total compensation for all services performed ..." void Section 59.600 RSMo 1959, and the fee authorized under Supreme Court Rule 6.04?"

The provisions of the bill to which you refer have been numbered Section 50.334 by the Revisor of Statutes and provides in part as follows:

"1. In all counties having a population of less than five hundred thousand and an assessed valuation of less than three hundred million dollars, the recorder of deeds, the circuit clerk, the circuit clerk-ex officio recorder of deeds, or the clerk of Court of Common Pleas, as the case may be, shall receive as total compensation for all services performed by him an annual salary which shall be computed on a combination population assessed valuation basis as set forth in the following schedule."

Honorable George W. Parker

Supreme Court Rule 6.04 provides in full as follows:

"All enrollment fees and penalties paid to the Circuit Clerks shall be forwarded to the Clerk of the Supreme Court on or before the 5th day of the month after that in which they were collected, together with a statement showing by whom each fee and penalty were paid.

"As compensation to the Clerks of the said Circuit Courts, at the time of remitting said Clerk may retain ten cents out of each annual enrollment fee. The Clerk of the Supreme Court shall file and preserve said statements and shall keep enrollment fees and penalties in a separate fund to be known as the 'Bar Fund' and to be paid out as herein-after provided."

We note that the clerks of the circuit court have been authorized to retain ten cents out of each annual enrollment fee since the rule was first promulgated. Mo. Bar Journal, Vol. 5, p. 323 (1934).

It is clear that the Supreme Court of the State has the authority to provide for the integration of the Bar and for the collection of an annual enrollment fee. The provisions of the rule and those relating to the administration of the Bar are legislative in nature. Lathrop v. Donohue, 367 U.S. 820, 6 L.Ed. 2d 1191, 81 S.Ct. 1826 (1961).

We note also that these rules were not promulgated under Section 5 of Article V of the Missouri Constitution which authorizes the Supreme Court of Missouri to promulgate rules of practice and procedure and which rules so promulgated may be amended or annulled only by legislation directed specifically to that purpose.

We have given consideration to the theory which has great merit that the compensation provided for the clerk by this rule is in fact for service outside of the regular duties of the clerk and therefore not affected by the total compensation provisions of Section 50.334. Walsh v. County of St. Louis, 353 S.W.2d 779 (1962).

In our view, however, although the Supreme Court might have delegated some other official or agency to collect the bar fee and might have authorized such official or agency to retain a part of such fee as compensation, the fact remains that the only official so authorized has been the circuit clerk and that the provisions of the rule thus incorporated the function of the collection

Honorable George W. Parker

of the bar enrollment fee into the group of services performed by the circuit clerks and the compensation therefore became compensation for services rendered by such officer. Unquestionably, the legislature has the right to govern the salary of such clerks; and in enacting the total compensation provisions contained in Section 50.334, the legislature clearly intended that such clerks not retain any other compensation paid to them in their official capacity. In our opinion, such clerks are no longer authorized to retain the ten cents out of each bar enrollment fee.

It is also our view that such compensation is, in fact, payable to the clerk by virtue of the services rendered by his office and constitutes "fees collected by virtue of his office" within the meaning of Section 483.560, RSMo 1959, and as a consequence, must be paid into the county treasury by all such clerks within the provisions of Section 50.334.

You also inquired as to whether or not Section 59.600, RSMo 1959, which was not expressly repealed by House Bill No. 119 is "void".

Section 59.600, RSMo 1959, provides in full as follows:

"For making the transcript provided for in section 59.580, the recorder shall be entitled to such compensation as may be allowed by the county court, not to exceed eight cents for every one hundred words and figures so transcribed, to be paid out of the county treasury."

In our opinion, circuit clerks-ex officio recorders and recorders entitled to the total compensation under the provisions of Section 50.334 are no longer entitled to the compensation provided by the above Section 59.600. Further, such officers are not to collect the amounts set out in Section 59.600 for the services rendered for the reason that there is no point in having such amounts paid out of the county treasury and paid back into the county treasury.

CONCLUSION

It is, therefore, the opinion of this office with respect to House Bill 119 of the 75th General Assembly (Section 50.334, V.A.M.S.) that circuit clerks coming within the total compensation provisions of said bill are no longer authorized to retain the ten cents out of each bar enrollment fee allowed under Supreme Court Rule 6.04 and that circuit clerks-recorders and recorders covered by such section are not entitled to charge the fees provided for transcribing

Honorable George W. Parker

books or records belonging to the office of the recorder of deeds under Section 59.600, RSMo 1959.

The foregoing opinion, which I hereby approve, was prepared by my assistant John C. Klaffenbach.

Yours very truly,

A handwritten signature in black ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a stylized "D".

JOHN C. DANFORTH
Attorney General

SCHOOLS:
JUNIOR COLLEGES:
ASSESSMENTS:

If a junior college district includes parts of more than one county and the State Tax Commission increases by more than ten percent the assessed valuation of only one county in the district, the district must revise ~~its~~ tax rate pursuant to the requirements of Section 137.073, RSMo 1959. Such a junior college district should revise its rate of levy to the extent necessary to produce from all taxable property in the district substantially the same amount of taxes as had been previously estimated to be produced by the original tax rate.

OPINION NO. 89

July 16, 1970

Honorable Robert S. Drake, Jr.
Prosecuting Attorney
Benton County Court House
Warsaw, Missouri 65355



Dear Mr. Drake:

This official opinion is issued in response to your request for a ruling on the following questions:

"Whether or not a Junior College School District established under 178.770 RSMo should lower its levy under Section 137.073 RSMo. (1969) if its district covers parts of more than one County and the State Tax Commission increases the assessed valuation of only one such County by more than ten per cent (10%) on real estate over the prior year's valuation and such valuation increase was made after the Junior College School District made its levy and certified the same to all County Collectors in its district.

"2. If the Junior College School District should lower its rate what formula should be used in arriving at the new rate."

I.

Section 137.073, RSMo 1959 states as follows:

Honorable Robert S. Drake, Jr.

"Readjustment of prior levy when county assessment increased ten per cent.-- Whenever the assessed valuation of real or personal property within the county has been increased by ten per cent or more over the prior year's valuation, either by an order of the state tax commission or by other action, and such increase is made after the rate of levy has been determined and levied by the county court, city council, school board, township board or other bodies legally authorized to make levies, and certified to the county clerk, then such taxing authorities shall immediately revise and lower the rates of levy to the extent necessary to produce from all taxable property substantially the same amount of taxes as previously estimated to be produced by the original levy. Where the taxing authority is a school district it shall only be required hereby to revise and lower the rates of levy to the extent necessary to produce from all taxable property substantially the same amount of taxes as previously estimated to be produced by the original levy, plus such additional amounts as may be necessary approximately to offset said district's reduction in the apportionment of state school moneys due to its increased valuation. The lower rate of levy shall then be recertified to the county clerk and extended upon the tax books for the current year. The term 'rate of levy' as used herein shall include not only those rates the taxing authorities shall be authorized to levy without a vote, but also those rates which have been or may be authorized by elections for additional or special purposes. No levy for public schools or libraries shall be reduced below a point that would entitle them to participate in state funds."

Initially, we must determine whether Section 137.073 applies to junior college districts. Although junior college districts are not specifically referred to in Section 137.073, reference is made

Honorable Robert S. Drake

to "other bodies legally authorized to make levies. . . ." Junior college districts do have taxing power and are authorized to levy taxes on property subject to their taxing power. See Section 178.870, RSMo 1967 Supp. Therefore, we conclude that junior college districts are included within the terms of Section 137.073.

Having reached this conclusion, does Section 137.073 require a junior college district to revise its levy if it includes parts of more than one county and the State Tax Commission increases by more than ten percent the assessed valuation of only one of the counties included in the district? We believe this question has been answered by Opinion No. 75 dated August 29, 1955, to the Honorable John M. Rice. In Opinion No. 75, we concluded that where the territory of a school district extends into more than one county and the assessed valuation of one of these counties is increased by more than 10 percent after the district's rate of levy has been determined, the school board must redetermine the rate of levy in accordance with Section 137.073. We see no reason why this same conclusion should not apply to a junior college district which covers more than one county.

II.

Your second inquiry is what formula a junior college district should use in revising its tax rate pursuant to Section 137.073. The basic formula is provided in Section 137.073, as follows:

" . . . then such taxing authority shall immediately revise and lower the rates of levy to the extent necessary to produce from all taxable property substantially the same amount of taxes as previously estimated to be produced by the original levy. . . . "

Therefore, taking into account the increased valuation of one of the counties in the district, the junior college district in question must revise and lower its levy to the extent necessary to produce from all taxable property in the district the same amount of taxes as had been previously estimated to be produced by the original tax rate.

CONCLUSION

Therefore, it is the conclusion of this office that:

1. If a junior college district includes parts of more than one county and the State Tax Commission increases by more than ten

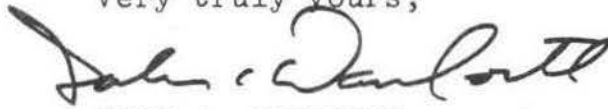
Honorable Robert S. Drake, Jr.

percent the assessed valuation of only one county in the district, the district must revise its tax rate pursuant to the requirements of Section 137.073, RSMo 1959.

2. Such a junior college district should revise its rate of levy to the extent necessary to produce from all taxable property in the district substantially the same amount of taxes as had been previously estimated to be produced by the original tax rate.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, D. Brook Bartlett.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

Enclosure:

Op. No. 75
8-29-55, Rice

TAXATION: An endorsement written on the back of a check presented in payment of tangible property taxes expressly stating that payment is being made under protest and citing an appropriate statute which clearly sets forth the grounds for protest, is a sufficient payment under protest to require impounding of the taxes so protested under Senate Bill No. 39, 75th General Assembly.

January 12, 1970

OPINION NO. 90

Honorable Robert S. Drake, Jr.
Prosecuting Attorney
Benton County Court House
Warsaw, Missouri 65355



Dear Mr. Drake:

This official opinion is rendered in response to the request contained in your recent letter relative to payment of tangible property taxes under protest as provided for in Senate Bill No. 39, 75th General Assembly.

The question raised by your letter is as follows:

"Whether or not the words:

'The endorsee, indorses this instrument with full knowledge that payment is being made under protest. Regard; Section 137.073, RSMo.'

"or

'Endorsee, endorsee this instrument with full knowledge that payment is being made under protest Regard, Section 137.073 RSMo.'

"written on the back of a bank check and presented to the collector of Revenue for Benton County, Missouri, for payment of State and

Honorable Robert S. Drake, Jr.

County taxes for the year 1969 is sufficient to constitute a 'written statement' setting forth the grounds on which a 'protest is based,' and the citing of a 'law, statute, or facts' on which the payor relies so as to require the Collector to impound, under RSMo 139.031 (1969), in a separate fund all or a portion of the money so paid."

Senate Bill No. 39 adds to Chapter 139, Missouri Revised Statutes entitled "payment and Collection of Current Taxes", a new section to be known as Section 139.031, authorizing the payment of taxes except taxes collected by the Director of Revenue, under protest and providing procedures for the recovery of taxes erroneously or illegally collected. Pertinent language of this bill is as follows:

"Section 1. Any taxpayer may protest all or any part of any taxes assessed against him, except taxes collected by the Director of Revenue of Missouri. Any such taxpayer desiring to pay any taxes under protest shall, at the time of paying such taxes, file with the collector a written statement setting forth the grounds on which his protest is based, and shall further cite any law, statute, or facts on which he relies in protesting the whole or any part of such taxes.

"Section 2. The collector shall disburse to the proper official all portions of taxes not so protested and he shall impound in a separate fund all portions of such taxes which are so protested. Every taxpayer protesting the payment of taxes, within ninety days after filing his protest, shall commence an action against the collector by filing a petition for the recovery of the amount protested in the Circuit Court of the county in which the collector maintains his office. If any taxpayer so protesting his taxes shall fail to commence an action in the Circuit Court for the recovery of the taxes protested within the time herein prescribed, such protest shall become null and void and of no effect, and the collector shall then disburse to the proper official the taxes impounded, as hereinabove provided."

Honorable Robert S. Drake, Jr.

Prior to enactment of this statute there was no statutory provision for payment of tangible property taxes under protest in Missouri and there is nothing in the statute furnishing a guide to the form and content of a protest other than the language quoted above. The general rule is that where there are statutory provisions authorizing payment of taxes under protest, a taxpayer must bring himself within and substantially comply with the terms of the statute. 84 C.J.S., Taxation, Section 638(b).

In the case of *District of Columbia v. McFall*, 188 F.2d 991, the court discussed the legal theory of paying taxes under protest. In the opinion it is said:

" * * * Aside from its bearing upon the question of involuntary payment, the protest has two purposes, to serve notice upon the Government of the discontent of the taxpayer and to define the grounds upon which the taxpayer stands."

In order to comply with Senate Bill No. 39 the taxpayer " * * * shall, at the time of paying such taxes, file with the collector a written statement setting forth the grounds on which his protest is based, and shall further cite any law, statute, or facts on which he relies in protesting the whole or any part of such taxes."

The statute is not clear as to whether the statement is to be in the form of a paper separate from the instrument of payment or whether it may be included on a check. Likewise there is no guide as to how extensively the grounds must be set forth.

There is authority for the proposition that a protest is sufficient which points out the objection to the tax with enough clearness to notify the collector of its true nature and character. 51 Am.Jur., Taxation, Section 1189, and cases cited therein. In *Albro v. Kettelle*, 42 R.I.270, 107 A.198, the Supreme Court of Rhode Island held that a collector's receipt on which was inscribed "paid under protest" constituted a protest in writing.

An endorsement is a writing and in the present case, although somewhat lacking in grammatical composition, it expressly states that "payment is being made under protest." Furthermore, the endorsement contains the language, "Regard, Section 137.073 RSMo." The word, "regard", according to its ordinary meaning, is one of caution. It suggests the collector take heed. Webster defines the word as "4: a ground of action or opinion: Motive 5: an aspect to be taken into consideration:"

Honorable Robert S. Drake, Jr.

While it would be desirable to have protests under this statute furnished in more detailed form on a paper separate from the instrument of payment, we cannot conclude that a writing which places the collector on notice as to payment under protest, citing a statute which under appropriate circumstances requires adjustment of taxes, is not a protest within the meaning of Senate Bill No. 39, 75th General Assembly. Accordingly it is our view that under the particular facts of the matter presented to us, a legal payment under protest is indicated.

Section 2 of the Bill provides that the collector " * * * shall impound in a separate fund all portions of such taxes which are so protested. * * * " Other provisions are made for releasing the impounded funds.

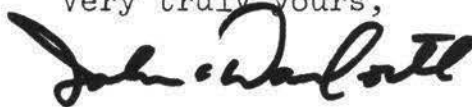
Inasmuch as it has been concluded that the taxes have been paid under protest within the meaning of Section 1 of this Bill, it follows that Section 2 of the Bill requires that such taxes be impounded.

CONCLUSION

Therefore, it is the opinion of this office that an endorsement written on the back of a check presented in payment of tangible property taxes expressly stating that payment is being made under protest and citing an appropriate statute which clearly sets forth the grounds for protest, is a sufficient payment under protest to require impounding of the taxes so protested under Senate Bill No. 39, 75th General Assembly.

The foregoing opinion, which I hereby approve, was prepared by my assistant John E. Park.

Very truly yours,



JOHN C. DANFORTH
Attorney General

CITIES, TOWNS,
AND VILLAGES:
OFFICERS:

There is no constitutional or statutory provision disqualifying a person from running for the position of Alderman of the City of St. Louis because he is employed as an assistant principal in the School District of the City of St. Louis.

OPINION NO. 92

February 11, 1970

Honorable Fred Williams
State Representative
72nd District
5621 Chamberlain
St. Louis, Missouri 63112



Dear Representative Williams:

This letter is in response to your request for the opinion of this office on whether an assistant principal of a grade school can legally run for the office of Alderman of the City of St. Louis.

There is no provision in the Missouri Constitution setting forth particular requirements for holding a municipal office. However, Article VII, Section 8 is applicable to all public offices in the State and states as follows:

"No person shall be elected or appointed to any civil or military office in this state who is not a citizen of the United States, and who shall not have resided in this state one year next preceding his election or appointment, except that the residence in this state shall not be necessary in cases of appointment to administrative positions requiring technical or specialized skill or knowledge."

Similarly, there is no qualification for an Alderman under the Charter of the City of St. Louis, Missouri which would prevent

Honorable Fred Williams

a person because he is the assistant principal of a grade school from holding the position of Alderman. Section 2 of Article IV of the St. Louis Charter states as follows:

"No person shall become an Alderman except he be a voter and at least twenty-five years of age, and shall have been next before his election five years a citizen of the United States, three years a resident of the city, two years an assessed taxpayer of the city, and one year a resident of the ward from which elected, nor who shall have been convicted of malfeasance in office, bribery, or other corrupt practice of crime; and if any Alderman shall be so convicted or shall at any time not be a resident of such ward, he shall thereby forfeit his office. The salary of each Alderman shall be Three Thousand Dollars per annum."

We have found no statute pertaining to people holding administrative positions in the public schools of the State of Missouri which would disqualify an assistant principal from seeking election and, if elected, serving as a member of the Board of Aldermen of the City of St. Louis. In Section 168.221, RSMo 1967 Supp. the procedure for the removal of both probationary and permanent teachers and principals in a metropolitan school district is set forth. There is nothing in this section which gives the Board of Education the power to discharge a principal for the reason that he has run for, been elected to, and serves as a member of the Board of Aldermen of the City of St. Louis.

Should the principal in question be elected to the Board of Aldermen of the City of St. Louis, we do not believe that there is a conflict between the duties of an assistant principal in the School District of the City of St. Louis and the duties of a member of the Board of Aldermen. The Board of Aldermen of the City of St. Louis does not have supervisory power over an assistant principal, nor does it control him or have the power of removal over him. Therefore, we see no inconsistency or incompatibility between the two positions. See State ex rel. Walker v. Buss, 135 Mo. 325, 36 S.W. 636 (1896) and 67 C.J.S. Officers §23.

We caution that we have not reviewed any rules and regu-

Honorable Fred Williams

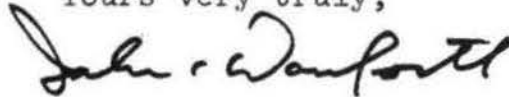
lations of the assistant principal's employer which may be a part of his employment contract. Therefore, this opinion does not pertain to the applicability of any such rules and regulations to the situation about which you inquire.

CONCLUSION

It is the conclusion of this office that there is no constitutional or statutory provision disqualifying a person from running for the position of Alderman of the City of St. Louis because he is employed as an assistant principal in the School District of the City of St. Louis.

The foregoing opinion, which I hereby approve, was prepared by my assistant, D. Brook Bartlett.

Yours very truly,

A handwritten signature in cursive script, appearing to read "John C. Danforth".

JOHN C. DANFORTH
Attorney General

PROSECUTING ATTORNEY:

Prosecuting attorney of second class county has authority and duty to appear on behalf of county officers, employees and board members who are sued in an action testing county's authority.

OPINION NO. 93

February 20, 1970

Honorable John Crow
Prosecuting Attorney
Greene County Court House
Springfield, Missouri 65802



Dear Mr. Crow:

This official opinion is issued pursuant to your request in which you advise us that a suit has been filed against a county of the second class, the judges of the county court, the county treasurer, the members of the county planning and zoning commission, and two individuals employed as building inspectors. The suit seeks injunctive and declaratory relief with regard to county zoning ordinances and their enforcement, and ancillary relief. You ask as to your authority and duty with regard to the representation of the individual defendants in the suit.

Section 56.060, RSMo 1959, provides that the prosecuting attorney of a county not having a county counselor is obliged to:

" . . . commence and prosecute all civil and criminal actions in his county in which the county or state is concerned, defend all suits against the state or county, . . . "

Section 56.070, provides that the prosecuting attorney of such a county is to " . . . represent generally the county in all matters of law, . . . "

In the case you describe the county is named as a defendant. The interest of the individual defendants appears to be indistinguishable from that of the county. Under these circumstances it is manifest that the prosecuting attorney should enter his

Honorable John Crow

appearance on behalf of the individuals in addition to representing the county. The county's interest in the action might well be prejudiced if the individuals were represented separately.

Quite aside from the county's being a party, however, there is no prohibition in the statute of the prosecuting attorney's representation of county officers, employees and board members who are sued in actions touching and concerning the county's business. The representation of the county might very well require the representation of the individuals.

The case of *State ex rel Lashly v. Wurdemann*, 183 Mo.App.28, 166 S.W.348 (1914) appears to be in point. There an action of mandamus was filed against the judges of the county court of a particular county, to compel them to issue a license for a dram-ship. The prosecuting attorney sought to appear on behalf of the defendants, even though they apparently did not want him to do so. The court held that the suit challenged a county function and that the prosecuting attorney was entitled to represent the county's interest in the suit even though it took the form of a suit against the county judges individually.

The suit you describe challenges the county's authority in the zoning area. No conflict of interest among the defendants appears. Under these circumstances we consider it to be the duty of the prosecuting attorney to protect the county's interest in maintaining its zoning authority, and this requires the representation of the individual defendants.

The situation is comparable to that faced by the Attorney General under Chapter 27 of the Revised Statutes, which is silent about the authority of the Attorney General to appear on behalf of individual state officers and employees who are made parties to litigation arising out of the performance of their official duties. This office has felt that it had the authority to represent individuals when such was necessary in the representation of the state's interest. Compare *Kirkpatrick v. Preisler*, 385 U.S. 450, 87 S.Ct. 613, 17 L.Ed.2d 511 (1967).

There might be cases in which the individual defendants had interests which were adverse to those of the county, or even, in which the prosecuting attorney might find it necessary to file suits on behalf of the county against county officers or employees. In these cases, the individual defendants would of course have to obtain individual counsel. When the suit tests the county's authority, however, the representation of the individuals seems clearly necessary.

Honorable John Crow

CONCLUSION

The prosecuting attorney of a second class county has the authority and the duty to represent county officers, employees and board members who are made defendants in a suit testing the authority of the county in the exercise of a county function.

The foregoing opinion, which I hereby approve, was prepared by my special assistant, Charles B. Blackmar.

Very truly yours,

A handwritten signature in cursive script, reading "John C. Danforth". The signature is written in dark ink and is positioned above the printed name and title.

JOHN C. DANFORTH
Attorney General

MOTOR VEHICLES:

LICENSES:

MOTOR VEHICLE LICENSES:

The Director of Revenue, as a
result of the enactment of

Senate Bill No. 242 by the 75th General Assembly amending Section 301.137, RSMo, cannot issue a special series of license plates for persons who have amateur radio operators' licenses.

January 9, 1970

OPINION NO. 95

Honorable Richard M. Marshall
Representative - 43rd District
St. Louis County
111 South Bemiston
St. Louis, Missouri 63105



Dear Mr. Marshall:

This is in reply to your request for an official opinion from this office concerning the question whether the Director of Revenue can issue a special series of license plates for persons who have amateur radio operators' licenses.

Your opinion request is prompted by the enactment of Senate Bill No. 242 by the 75th General Assembly amending Section 301.137, RSMo, deleting subsections 1 and 2 relating to special licenses for amateur operators' licenses.

Prior to Senate Bill No. 242, Section 301.137, RSMo, read as follows:

"1. Owners of motor vehicles who are residents of the state of Missouri, and who hold an unrevoked and unexpired official amateur radio license issued by the Federal Communications Commission, upon application, accompanied by proof of ownership of such amateur radio station license, complying with the state motor vehicle laws relating to registration and licensing of motor vehicles as contained in this chapter, and upon the payment of the regular license fee for tags as prescribed under section 301.060, and the payment of an additional fee of one dollar, shall be issued a license plate as prescribed by section 301.130,

Honorable Richard M. Marshall

for private passenger cars, upon which, in lieu of the numbers as prescribed by said section 301.130, shall be inscribed the official amateur radio call letters of such applicant as assigned by the Federal Communications Commission.

"2. The director of revenue shall make such rules and regulations as may be necessary to ascertain compliance with all state license laws relating to the use and operation of a private passenger car before issuing said lettered plates in lieu of the said numbered license plates, and all applications for such plates shall be made to the director of revenue.

"3. The director of revenue shall, on or before the first day of January each year, furnish to the Missouri state highway patrol and to the sheriffs of each county in the state of Missouri an alphabetically arranged list of the names, addresses and license plate letters of each person to whom a license plate is issued under the provisions of this section, and it shall be the duty of the Missouri state highway patrol and the sheriffs of the state to maintain and to keep current such lists for public information and inquiry."

As a result of Senate Bill No. 242, both subsections 1 and 2 are repealed and subsection 3 remains intact.

Thus, the legislature specifically repealed the specific authorization for these special plates although they did leave in the section directing that a list of such special plates be sent to the highway patrol and sheriffs.

The question then is in view of the repeal of any specific authorization for these special plates, can the Director of Revenue nevertheless issue such plates?

All plates now, except historical plates and plates for certain official vehicles, are issued pursuant to Section 301.130, Senate Bill No. 242, 75th General Assembly, which reads in part as follows:

"1. Upon the filing of an application for registration, together with such information as may be required by the director and the payment of fees heretofore provided, the director shall assign a number or numbers to each applicant and without further expense to the applicant shall issue and mail or deliver to him a certificate of registration in such form as the director shall prescribe and, unless otherwise

Honorable Richard M. Marshall

provided, a set of license plates bearing the name or the abbreviated name of the state, the month and year of expiration and the number or numbers assigned; except that a set of plates for commercial motor vehicles shall not be assigned on permanent basis but shall be issued pursuant to subsection 3 of section 301.030."

Section 301.131, RSMo, provides for historical plates for historic motor vehicles specially marked as such, and Section 301.260, RSMo, provides for specially marked plates for state and municipally owned motor vehicles.

The primary rule in construing statutes is to determine the legislative intent. *Hern v. Carpenter*, Mo., 312 S.W.2d 823. To get at the true meaning of the language employed in a statute, the court must look at the whole purpose of the act, the law as it was before the enactment, and the change in the law intended to be made. *Pembroke v. Huston*, 180 Mo.627, 79 S.W.470. In ascertaining legislative intention, reference should be had to the policy adopted by the legislature in reference to the particular subject matter. *State ex rel. Lentine v. State Board of Health*, 334 Mo.220, 65 S.W.2d 943.

It is also said that provisions not found plainly written in a statute or necessarily implied from what is written will not be imparted or interpolated therein in order that existence of a right may be made to appear when otherwise, upon the face of the statute, it would not appear. *Missouri Public Service Co. v. Platte-Clay Elec. Co-op., Inc.*, 407 S.W.2d 883.

Most important here, it must be presumed that the legislature knows the existing law, and seeks to make some change therein when it enacts a statute. *Reed v. Goldneck*, 112 Mo.App.310, 86 S.W.1104. And, in construing a statute repealing one statute and substituting another, it must be assumed that the legislature intended something by repeal of an old statute and enactment of a new statute in lieu of it. *Darrah v. Foster*, Mo., 355 S.W.2d 24.

It is our opinion that in view of these rules of statutory construction the legislature intended by repealing the specific authority for these special plates that no such special plates be issued.

The fact that the legislature did not repeal subsection 3 of Section 301.137 does not change our view because that subsection only operates in reference to the repealed provisions and, therefore, could not be used in conjunction with any other statute. Subsection 3 does not by itself in any way authorize the issuance of these special plates.

Our opinion is strengthened by the fact that other types of special plates (historical plates and official plates) are also

Honorable Richard M. Marshall

specifically authorized by the legislature. This shows legislative intent that the Director of Revenue is not authorized on his own to issue special plates in recognition of certain types of groups and such recognition will only be done by specific legislation.

The purpose of Section 301.130 is that the Director of Revenue is to issue a series of plates to the general public in an orderly fashion, upon payment of the regular fees, without special designation or recognition of any group or individual.

CONCLUSION

Therefore, it is the opinion of this office that the Director of Revenue, as a result of the enactment of Senate Bill No. 242 by the 75th General Assembly amending Section 301.137, RSMo, cannot issue a special series of license plates for persons who have amateur radio operators' licenses.

The foregoing opinion, which I hereby approve, was prepared by my assistant Walter W. Nowotny, Jr.

Very truly yours,



JOHN C. DANFORTH
Attorney General

CONSTITUTIONAL LAW:
STATUTES:
GENERAL ASSEMBLY:

1. A legislator, removed from his position as a result of an ouster suit wherein he is declared to have lacked the qualifications required

for election, is a de facto officer when he holds office by some color of right or title.

2. It is well established in Missouri jurisprudence that the acts of a de facto officer are valid and effectual when they concern the rights of the public, until the officer's title is judged insufficient. Therefore, those measures that were approved by a bare constitutional majority with the ousted legislator a member of the majority, in the last session of the General Assembly, are valid.

OPINION NO. 96

February 2, 1970

Honorable Frank Bild
State Representative
District No. 47
Capitol Building
Jefferson City, Missouri 65101



Dear Representative Bild:

You recently requested an opinion of this office concerning the following question:

"What is the status of bills adopted by the General Assembly by a bare constitutional majority, namely 82 votes, when one of those votes was cast by a State Representative who subsequently is declared to be a non-resident of his district and therefore not eligible to represent the district which he purported to represent, and which office he was holding at the time that this vote was cast?"

I presume that you are referring to the effect of a declaration of ineligibility by a court as a result of ouster proceedings initiated by the Attorney General.

Critical to the determination of whether the acts of a legislator subsequently ousted from his position are valid is a determination of his status as an officer. Clearly, a legislator is a public officer, according to the definition stated in the decision of State ex rel. Zevely v. Hackmann, 254 S.W. 53 (Mo. 1923), which stated:

Honorable Frank Bild

"A public officer is one elected or appointed in the manner prescribed by law, as an agent of the public in the performance of duties imposed by law and exercise of authority necessary and incidental to a proper discharge of such duties--. . ." (At 54)

It must then be determined whether the legislator is a de facto officer or a usurper during the period he serves in the legislature, prior to his ouster.

For the acts of the ousted representative to be valid, he must be characterized a de facto officer instead of a usurper. The decision of State ex rel. City of Republic v. Smith, 139 S.W.2d 929 (Mo. 1940) drew a distinction between de facto officers and usurpers. That decision stated:

". . . 'An officer de facto is to be distinguished from an officer de jure, and is one who has the reputation or appearance of being the officer he assumes to be but who, in fact, under the law, has no right or title to the office he assumes to hold. He is distinguished from a mere usurper or intruder by the fact that the former holds by some color of right or title while the latter intrudes upon the office and assumes to exercise its functions without either the legal title or color of right to such office. Where one is actually in possession of a public office and discharges the duties thereof, the color of right which constitutes him a de facto officer, may consist in an election or appointment, holding over after the expiration of his term, or by acquiescence by the public for such a length of time as to raise the presumption of a colorable right by election, appointment, or other legal authority to hold such office. The duties of the office are exercised under color of a known election or appointment which is void for want of power in the electing or appointing body, or for some defect or irregularity in its exercise, such ineligibility, want of power or defect being unknown to the public.' . . ." (at 933)

Accord, *Alleger v. School District No. 16, Newton County*, 142 S.W.2d 660 (Mo.App. 1940). See also 67 C.J.S., *Officers*, §135 et. seq.

Honorable Frank Bild

A further relevant qualification to the de facto officer doctrine was elaborated by the decision in *Alleger v. School District No. 16, Newton County*, 142 S.W.2d 660 (Mo.App. 1940). That decision stated that if the public or affected third persons are not deceived by the acts of a de facto officer because they know that the officer is only de facto and not de jure, then the acts of the officer will not be validated insofar as they affect the persons with knowledge. However, it has been held that knowledge that an election has been contested or that a dispute has arisen concerning the legality of an election is not sufficient to preclude a person from relying upon the acts of one who is determined to be a de facto officer. *Heyland v. Wayne Independent School District No. 5 of Wayne Tp.*, 4 N.W.2d 278 (Iowa 1942).

In general, one who is classified a de facto officer must, as a threshold requirement, have held office under color of right or title. 67 C. J.S., Officers, §138. However, the decisions of courts of this state have provided content to this term by describing what constitutes color of right or title.

According to the definition of de facto officer adopted by Missouri courts, a legislator would be a de facto officer, although he lacked the qualifications necessary to be a member of the legislature at the time of his election if he had been duly certified as elected, had taken the required oath of office, had been generally regarded by other legislators and the public as being a de jure legislator, had performed his duties for a length of time sufficient to raise the presumption of a colorable right by election to hold such office, and had performed such duties as might be performed by a qualified legislator. If an ousted legislator meets these standards, then he was an officer de facto.

Some decisions in other jurisdictions have addressed themselves to the question of the validity of an officer's acts when that officer subsequently is found to have been ineligible for his position. The case of *Hogan v. Hamilton County*, 132 Tenn. 554, 179 S.W. 128 (1915) is authority for the proposition that even if an official was ineligible to take office, the fact that he took the oath and was regarded as the occupant of that position was sufficient to make him a de facto officer. A similar conclusion was reached in the case of *Attorney-General v. Megin*, 63 N. H. 378 (1885), which held that when one who, though not legally elected, is declared so and inducted into office, he is a de facto officer.

The courts of the State of Missouri have played a leading role in the development of the de facto officer doctrine. The Missouri decisions have stated a general rule that the acts of an officer de facto are as valid and effectual where they concern the public

Honorable Frank Bild

or the rights of third persons, until his title is judged insufficient, as though he were an officer de jure. The rationale supporting the postulation of the general rule was delineated in the case of *St. Louis County Court v. Sparks*, 10 Mo. 117 (1846). The court stated that, if a person is unqualified,

" . . . his acts in the discharge of his duties are valid and binding. He may be guilty of usurpation, and be punished for acting without being qualified; but the peace and repose of society imperiously required that his official acts, so far as others are concerned, should be valid. This is true of the highest and lowest officers from the Governor to the Constable. . . ." (at 121)

The decision in *Harbaugh v. Winsor*, 38 Mo. 327 (1886) elaborated on the policy established by the *Sparks* decision. The *Harbaugh* decision indicated that to require third persons to ascertain whether an officer has been properly elected or appointed before submitting to his authority would be an onerous burden upon the governmental machinery of this state and upon the public. Commenting on the application of the de facto officer doctrine in Missouri, the Supreme Court of the United States, in *Ralls County v. Douglass*, 105 U.S. 728, 26 L.Ed. 957 (1881) commented:

"In no State is it more authoritatively settled than in Missouri that 'the acts of an officer de facto (although his title may be bad) are valid, so far as they concern the public or the rights of third persons who have an interest in the things done,' . . ." (at 730)

Other leading Missouri cases holding that, so far as third persons and the public are concerned, there is no practical difference between the acts of de jure and a de facto officer include: *School District of Kirkwood R-7 v. Zeibig*, 317 S.W.2d 295 (Mo. 1958); *Fort Osage Drainage District of Jackson County v. Jackson County*, 275 S.W.2d 326 (Mo. 1955); *State ex rel. City of Republic v. Smith*, 139 S.W.2d 929 (Mo.App. 1940); *In re Bank of Mt. Moriah's Liquidation*, 49 S.W.2d 275 (Mo.App. 1932).

A case analogous to that at hand is the *Fort Osage Drainage District* case, supra. In that case, the Missouri Supreme Court held that where the acts of a drainage district board in levying a tax were acts of de facto officers, such tax levy was valid notwithstanding the fact that the board of supervisors of the district had not been legally and lawfully elected. Other jurisdictions have also held that the acts of a de facto officer are valid

Honorable Frank Bild

insofar as they concern the rights of the public. E.g. United States ex rel. Watkins v. Commonwealth of Pennsylvania, 214 F.Supp. 913 (W.D.Pa. 1963); Borough of Pleasant Hills v. Jefferson Tp., 59 A.2d 697 (Pa. 1948); State v. Levy, 34 A.2d 370 (Vt. 1943). Watkins, supra, holds that the acts of malapportioned legislatures are valid despite the inherent denial of equal protection involved. See also, 67 C.J.S., Officers, §146.

CONCLUSION

It is the conclusion of this office that:

1. A legislator, removed from his position as a result of an ouster suit wherein he is declared to have lacked the qualifications required for election, is a de facto officer when he holds office by some color of right or title.

2. It is well established in Missouri jurisprudence that the acts of a de facto officer are valid and effectual when they concern the rights of the public, until the officer's title is judged insufficient. Therefore, those measures that were approved by a bare constitutional majority with the ousted legislator a member of the majority, in the last session of the General Assembly, are valid.

The foregoing opinion, which I hereby approve, was prepared for me by my assistant, Peter H. Ruger.

Yours very truly,



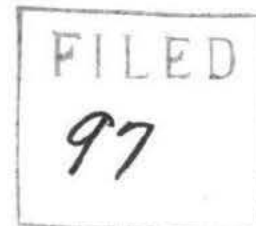
JOHN C. DANFORTH
Attorney General

TAXATION: It is mandatory for a taxpayer to file suit to compel refund of taxes paid under protest in accordance with the provisions of Sections 1, 2 and 3 of Senate Bill No. 39, 75th General Assembly, (Section 139.031, V.A.M.S.) and the county court is not empowered to take administrative action authorizing the collector to refund such taxes. Section 4 of Senate Bill No. 39 authorizes refund by the collector of any real or tangible personal property tax mistakenly or erroneously paid.

February 10, 1970

OPINION NO. 97

Honorable Urban C. Bergbauer, Jr.
Prosecuting Attorney
Iron County Court House
Ironton, Missouri 63650



Dear Mr. Bergbauer:

This official opinion is rendered in response to the request contained in your recent letter relative to Senate Bill No. 39, 75th General Assembly.

The question raised by your letter is as follows:

"Is it mandatory under Section 139.031, Vernon's Annotated Missouri Statutes, that the taxpayer file his petition for the recovery of the amount protested in the Circuit Court when it is agreed by the Collector and other county officials that the rate of levy certified by the school district should be reduced or may the County Court take administrative action to authorize the Collector to refund such taxes that were paid under protest?"

Section 139.031, V.A.M.S. is contained in Senate Bill No. 39, 75th General Assembly and adds to Chapter 139 of the Revised Statutes of Missouri relating to "Payment and Collection of Current Taxes" a new section authorizing the payment of taxes under protest and providing certain new procedures for the recovery of taxes.

Honorable Urban C. Bergbauer, Jr.

The language of the new law pertinent to the present inquiry is as follows:

"Section 1. Any taxpayer may protest all or any part of any taxes assessed against him, except taxes collected by the Director of Revenue of Missouri. Any such taxpayer desiring to pay any taxes under protest shall, at the time of paying such taxes, file with the collector a written statement setting forth the grounds on which his protest is based, and shall further cite any law, statute, or facts on which he relies in protesting the whole or any part of such taxes.

"Section 2. The collector shall disburse to the proper official all portions of taxes not so protested, and he shall impound in a separate fund all portions of such taxes which are so protested. Every taxpayer protesting the payment of taxes, within ninety days after filing his protest, shall commence an action against the collector by filing a petition for the recovery of the amount protested in the Circuit Court of the county in which the collector maintains his office. If any taxpayer so protesting his taxes shall fail to commence an action in the Circuit Court for the recovery of the taxes protested within the time herein prescribed, such protest shall become null and void and of no effect, and the collector shall then disburse to the proper official the taxes impounded, as hereinabove provided." (Emphasis supplied).

"Section 3. Trial of the action in the Circuit Court shall be in the manner prescribed for non-jury civil proceedings, and, after determination of the issues, the court shall make such orders as may be just and equitable to refund to the taxpayer all or any part of the taxes paid under protest or to authorize the collector to release and disburse all or any part of the impounded taxes. Either party to the proceedings may appeal the determination of the Circuit Court.

"Section 4. All county collectors of taxes, and the collector of taxes in any city not within a county, shall, upon written application of a taxpayer, refund any real or tangible personal property tax mistakenly or erroneously paid in whole or in part to the collector. Such application shall be filed within one year after the tax is mistakenly or erroneously paid. The County Court, or other appropriate body or official,

Honorable Urban C. Bergbauer, Jr.

shall make available to the collector funds necessary to make refunds under this subsection by issuing warrants upon the fund to which the mistaken or erroneous payment has been credited, or otherwise."

Although the language of this law is ambiguous, it is apparent that provision is made for two separate tax recovery procedures, one relating to errors in payment covered by Section 4, and the other relating to illegality on grounds other than mistake or error in payment set forth in Sections 1, 2 and 3. This is borne out by the language used. Section 1 refers to "any taxes assessed" and allows a taxpayer to contest the tax if the statutory procedures are followed. However, Section 4 refers to tax "mistakenly or erroneously paid" and provides a different procedure for recovering taxes in this category.

The legislature has recognized the fact that while a tax may be legally assessed, errors or mistakes in payment will and do occur as, for example, double payment of the same tax. In these cases it was considered unnecessary to resort to litigation where the error is acknowledged by the tax collecting officials. Thus, Section 4 authorizes a refund of taxes in this category by administrative determination. The fact that the authors of this Bill were mindful of this is illustrated by the language of Section 4 of Senate Bill No. 39 as originally introduced and before amendment. In pertinent part the original bill stated:

"Section 4. Any collector of taxes who collects any tax from a taxpayer who previously had paid the same tax to the collector shall refund the duplicate payment * * * "

It is our view that these sections are mutually exclusive. If this were not the case, the provisions relating to payment under protest, impounding of funds and determination by litigation in court would be meaningless.

Therefore, if the case involves taxes objected to for reasons other than error or mistake in payment, it is governed by Sections 1, 2 and 3 of the Bill. According to these, the collector "shall" impound in a separate fund all taxes paid under protest. Also, every taxpayer protesting the payment of taxes, within ninety days after filing his protest, "shall" commence an action against the collector by filing a petition in the circuit court. The funds so impounded are to be held until an appropriate order of the circuit court has been entered which (1), directs a refund of all or part of such money to the taxpayer, or (2), authorizes the collector to release and disburse such money to the appropriate taxing authority. In the event no legal action is begun within ninety days after filing the protest, the collector shall disburse the impounded money to the proper official.

Honorable Urban C. Bergbauer, Jr.

The statute does not provide any administrative procedure for refunding tax money impounded in the separate fund as required by Section 2 of the Bill. Furthermore, we find no other law of this State granting such authority to collectors or other county officials.

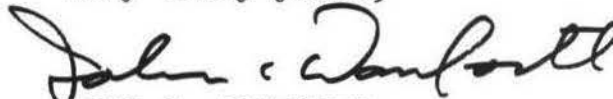
The language employed by the legislature in Section 2 of Senate Bill No. 39 clearly indicates it was the intent of that body to make the impounding of tax money and the filing of suit in the circuit court to enforce refund mandatory. The word "shall" is exclusively used in reference to these procedures. The courts of this State have uniformly held that statutes which use the word "shall" and set forth the results from a failure to comply, are mandatory statutes. State ex rel. Taylor v. Wade, 231 S.W.2d 179 (S.Ct.1959); State ex rel. Stevens v. Wurdeman, 246 S.W.189, 295 Mo.566.

CONCLUSION

Therefore, it is the opinion of this office that it is mandatory for a taxpayer to file suit to compel refund of taxes paid under protest in accordance with the provisions of Sections 1, 2 and 3 of Senate Bill No. 39, 75th General Assembly, (Section 139.031, V.A.M.S.) and the county court is not empowered to take administrative action authorizing the collector to refund such taxes. Section 4 of Senate Bill No. 39 authorizes refund by the collector of any real or tangible personal property tax mistakenly or erroneously paid.

The foregoing opinion which I hereby approve was prepared by my assistant, John E. Park.

Very truly yours,



JOHN C. DANFORTH
Attorney General

January 16, 1970

OPINION LETTER NO. 99

Honorable Joseph P. Teasdale
Prosecuting Attorney
Courthouse
Independence, Missouri 64050



Dear Mr. Teasdale:

This letter is in response to an opinion request from your office in which a question was presented concerning the interpretation of Sections 564.620, 564.630 and 564.640, RSMo Supp. 1967, and in particular, relating to the acquisition of concealable firearms in other states.

We are enclosing Opinion No. 35, 12/29/55, Grossenheider; Opinion No. 99, 5/24/56, Woodfill; Opinion No. 137, 5/19/64, O'Brien and Opinion No. 260, 5/26/66, Burlison, all of which are related interpretations of the sections involved. There were minor amendments to the statutes cited in these opinions. However, such amendments are not material to the question you present.

It is our view that the sections in question require a resident of this state to acquire a permit for the acquisition of a concealable firearm whether such acquisition is within or without this state.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Encs: Opinion No. 35, Grossenheider, 12/29/55
Opinion No. 99, Woodfill, 5/24/56
Opinion No. 137, O'Brien, 5/19/64
Opinion No. 260, Burlison, 5/26/66

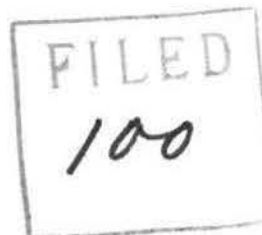
INSURANCE:

A life insurance company is in violation of Section 375.936, House Bill No. 84, Seventy-fifth General Assembly, if it issues a policy which excludes benefits payable to chiropractors.

OPINION NO. 100

March 30, 1970

Honorable Herman P. Winkelmann
State Representative
48th District
10111 Stonell Drive
St. Louis, Missouri 63123



Dear Representative Winkelmann:

This opinion is in response to your request for a ruling on whether Section 375.936, passed by the Seventy-fifth General Assembly in House Bill No. 84, prohibits life insurance companies from writing a policy which excludes by definition benefits payable to chiropractors.

Section 375.936, House Bill No. 84, Seventy-fifth General Assembly reads in part as follows:

"The following are hereby defined as
unfair methods of competition and
unfair and deceptive acts or practices
in the business of insurance:

* * * *

"7. 'Unfair discrimination'

* * * *

"b. Making or permitting any unfair
discrimination between the individuals
of the same class and of essentially

Honorable Herman P. Winkelmann

the same hazard in the amount of premium, policy fees, or rates charged for any policy or contract of accident or health insurance in the benefits payable thereunder, or in any of the terms or conditions of such contract, or in any other manner whatever including any unfair discrimination by not permitting the insured full freedom of choice in the selection of any duly licensed physicial, surgeon, or chiropractor;"

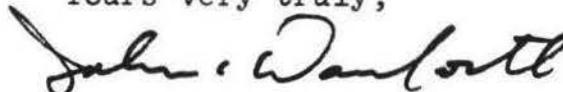
The language above quoted clearly enunicates an intention on the part of the legislature to prohibit an insurance company from excluding the use of a chiropractor by an insured.

CONCLUSION

It is the opinion of this office that a life insurance company is in violation of Section 375.936, House Bill No. 84, Seventy-fifth General Assembly, if it issues a policy which excludes benefits payable to chiropractors.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Alfred C. Sikes.

Yours very truly,



JOHN C. DANFORTH
Attorney General

April 2, 1970

ANSWER BY LETTER - BLACKMAR

OPINION LETTER NO. 101

Honorable John E. Parrish
Prosecuting Attorney
Camden County Court House
Camdenton, Missouri 65020



Dear Mr. Parrish:

This is in response to your request for an opinion concerning action taken by a school board of a reorganized school district in your county in terminating the contract of a teacher.

In your opinion request you indicate that the school board minutes for December 11, 1969, show a motion made, seconded and carried, that the principal "... be relieved of [sic] principal and teacher but that he receive his pay until end of contract of the school year 1969-1970" The minutes for that date also show that the superintendent of schools was authorized by the board to notify the principal "... of his dismissal as principal." We have also been given a copy of a letter by the superintendent of schools to the principal pursuant to the above mentioned board directive. The letter states in part:

"Thus, although your service to this school district is now completely terminated for this year and all school years to follow you will eventually receive all of your contracted salary for the 1969-70 school year."

The minutes of the school board meeting held December 16, 1969, show a motion made and seconded that the principal "... be re-instated and the letter he received concerning his dismissal retracted" The vote on that motion was tied three to three.

Section 168.121, RSMo Supp. 1967, states:

"The contract required in sections 163.101 and 168.111 shall be construed under the

Honorable John E. Parrish

general law of contracts, each party thereto being equally bound thereby. The board may not dismiss a teacher, except as provided in section 170.011, RSMo; but if the teacher's certificate is revoked the contract is thereby annulled. The faithful execution of the rules and regulations furnished by the board shall be considered as part of the contract if the rules and regulations furnished by the board shall be considered as part of the contract if the rules and regulations are furnished to the teacher by the board when the contract is made. If the teacher fails or refuses to comply with the terms of the contract or to execute the rules and regulations of the board, the board may refuse to pay the teacher, after due notice in writing is given by order of the board, until compliance therewith is rendered. If the schoolhouse is destroyed, the contract becomes void."

We have received no information that would indicate the teacher was dismissed pursuant to Section 170.011, RSMo Supp. 1967, or that the teacher was dismissed because the teacher's teaching certificate had been revoked. We further assume for the purposes of this opinion that the teacher was not dismissed for any cause permitted by Section 168.121, RSMo Supp. 1967.

In Wood v. Consolidated School District, 7 S.W.2d 1018 (K.C. Ct.App., 1928), the court in analyzing the statutory predecessor to Section 168.121 concluded that "a school board has no power or authority to dismiss a teacher, and any action of the board looking to that end would be ultra vires." Id. at 1020. The court relied on the following quotation from the decision in Oakes v. School District, 98 Mo.App. 163, 165, 71 S.W. 1060, 1061 (1903):

"By referring to section 9763, Revised Statutes, it will be seen that when a legally qualified teacher has been employed under a contract entered into with the board of directors of a school district to teach a school for a specified number of months, that it is not in the power of such board to dismiss him. If a board of directors dismiss a teacher it exceeds the limits of its statutable authority and its act in doing so binds no one. It is ultra vires. If directors by the employment of force prevent a teacher from complying with his contract, then such directors and not the district are liable to him for the damages resulting therefrom to him. Frazier v. School District, 24 Mo. App. 250; McCutchen v. Windsor, 55 Mo. 149; Arnold v. School District, 78 Mo. 226. As the discharge of the plaintiff

Honorable John E. Parrish

was nil and as the directors did not by the employment of force prevent him from continuing to teach the school, no reason appears why he did not continue to teach the entire term.'" Wood v. Consolidated School District, 7 S.W.2d 1018, 1020-1021 (K.C.Ct.App. 1928)

In Lynch v. Webb City School District, 373 S.W.2d 193, 197 (Spr. Ct.App. 1963) it was held that a school board had no implied authority to dismiss a teacher for any reason.

Therefore, we are of the opinion, based on the information accompanying this opinion request, that the dismissal on December 11, 1969, of the principal for the remainder of the school year was improper.

However, we believe that the action taken by the school board on December 11, 1969, can be interpreted as a determination not to renew the contract of the principal for the school year 1970-71 pursuant to Section 168.111(3), RSMo Supp. 1967. We base this conclusion on the entries in the minutes of the board meeting conducted on that date and on the letter sent to the principal by the superintendent of schools informing the principal of the action taken by the board. Section 168.111(3), RSMo Supp. 1967, states as follows:

"Each school board having one or more teachers under contract shall notify each teacher in writing concerning his reemployment or lack thereof on or before the fifteenth day of April of the year in which the contract then in force expires. Failure on the part of a board to give notice constitutes reemployment on the same terms as those provided in the contract of the current fiscal year; and not later than the first day of May of the same year the board shall present to each teacher not so notified a regular contract the same as if the teacher had been regularly reemployed. . . ."

We are of the opinion that the letter from the superintendent to the principal dated December 12, 1969, sent pursuant to the specific authorization of the board, was sufficient notice to the teacher that his contract would not be renewed for the 1970-71 school year.

Since the teacher was given notice on December 12, 1969, that he would not be reemployed, the action taken by the school board at a special meeting on December 16, 1969, to reinstate the teacher and to retract the letter notifying him of his lack of reemployment was not action on the question of reemployment as that term is used in Section 168.111(4), RSMo Supp. 1967, and the provisions of that section dealing with the tie vote on the question of reemployment are inapplicable. Section 168.111(4) provides:

Honorable John E. Parrish

"Any motion regarding lack of reemployment of a teacher shall include only one person and a tie vote thereon constitutes reemployment. Disapproval of reemployment to be effective requires a majority vote of the whole board."

Because the motion before the board at the December 16, 1969, special meeting of the board was to reinstate the principal and to retract the letter of December 12, 1969, and did not deal with the question of reemployment under Section 168.111(3), the provisions of Section 162.301, RSMo Supp. 1967, would apply to the vote on that motion. Under Section 162.301, RSMo Supp. 1967:

". . . [w]hen there is an equal division of the whole board upon any question except the reemployment of a teacher, the county superintendent of schools, if requested by at least three members of the school board, shall cast the deciding vote upon the question, and for the determination of the question shall be considered a member of the board."

This office has been informed that the office of county superintendent of schools has been abolished in Camden County and that three members of the school board have petitioned the county superintendent of schools to break the deadlock. Section 179.220 RSMo Supp. 1967, provides the procedures to be followed in breaking the deadlock when the office of county superintendent of schools has been abolished. That section states:

"1. In all counties where the office of county superintendent of schools is abolished, the county court or county council may designate a temporary superintendent of schools who shall serve only for the period of time which will be required to arbitrate any controversy which may exist in or between any school districts within the county. No person shall receive any additional remuneration for time or expenses incurred in the performance of duties established or delegated in accordance with this section.

#

"7. In any circumstances in which an appointment must be made, a meeting or election called or other function or duty performed, which would

Honorable John E. Parrish

have been performed by the county superintendent if the office had not been abolished, the county court or county council shall make the necessary arrangements within its discretion either on its order or by designating a school district superintendent to perform the duty, except that such assignment shall be limited to the time required to perform the duty designated by the county court or county council."

Under that statute, the county court must resolve the deadlock or designate a school district superintendent to perform this duty.

If the deadlock should be resolved in favor of retracting the letter of December 11, 1969, then the principal will no longer have notice that his contract is not to be renewed and Section 168.111, RSMo Supp. 1967, is once more applicable. Under that statute the school board will have to vote once again as to whether to reemploy the teacher for the next school year. If the board should again be equally split, the teacher would be reemployed for the next school year. If the board fails to act by April 15 one way or the other, the teacher is deemed by that statute to be reemployed for the next school year.

Very truly yours,

JOHN C. DANFORTH
Attorney General

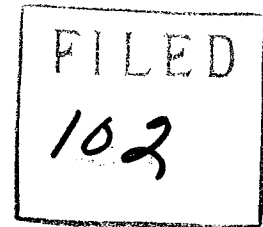
SCHOOLS:

Subject to the restrictions set forth in Section 177.101, RSMo Supp. 1967, the Doniphan R-I School District may enter into an agreement with the State Inter-Agency Council for Outdoor Recreation for a grant-in-aid from the Federal Land and Water Conservation Fund to assist the school district in the purchase of a school-community park.

OPINION NO. 102

January 30, 1970

Mr. Robert L. Dunkeson
Executive Secretary
State Inter-Agency Council
for Outdoor Recreation
Post Office Box 564
Jefferson City, Missouri 65101



Dear Mr. Dunkeson:

This letter is in response to your request for an official opinion of this office on the following question:

"Can a six director school district legally sign the Project Proposal Assurances and Project Agreement with attached General Provisions (copy enclosed). This agreement would be between a School Board and the State Inter-Agency Council for Outdoor Recreation."

Your opinion request also contained the following brief description of the facts giving rise to this request:

"The R-I School District of Doniphan proposes to enter into an agreement with the State Inter-Agency Council for Outdoor Recreation for a grant-in-aid from the federal Land and Water Conservation Fund to acquire, develop, maintain, and operate twenty-two (22) acres of a school-community park."

We have reviewed the Project Agreement with attached General Provisions and the Project Proposal Assurances, all of which were enclosed with your opinion request. Also, we have examined the copy of the Bureau of Outdoor Recreation Grants-In-Aid Manual provided to us by your office. We assume these are all of the documents which contain any terms or conditions applicable to the proposed agreement between the R-I School District of Doniphan and the

Mr. Robert L. Dunkeson

State Inter-Agency Council for Outdoor Recreation. In addition to these factual matters, we have reviewed the Land and Water Conservation Fund Act of 1965, 16 U.S.C.A. 460d, 460l-4 to 460l-11 and certain Missouri statutes pertaining to the powers of six director school districts.

From a review of these documents we have determined that the factual situation is basically as follows: The Doniphan R-I School District proposes to acquire an additional twenty-two acres adjoining its present park and recreational facilities, which are maintained for school and community use. The twenty-two acres in question is a tract of land with virgin timber and an existing lake which could be developed at a minimal cost into an extension of the present facilities owned by the school. The Doniphan School District desires to obtain a grant from the Federal Land and Water Conservation Fund to acquire, develop and maintain this tract as a school-community park.

As a condition to obtaining this assistance from the federal government, the district would agree not to use this additional tract for any purpose other than the public outdoor recreation use set forth in the Project Proposal unless the additional use is approved by the Director of Outdoor Recreation and/or the Executive Director of the State Inter-Agency Council for Outdoor Recreation. (See Section 11 of the General Provisions, Section 3A of the Project Proposal Assurances and 16 U.S.C.A., Section 460l-8(f)). The public outdoor recreation use outlined in the Project Proposal includes both school activities and community or general use. The school district would assure the federal government that it has the ability to finance and maintain the facility being developed according to certain standards set forth by the Bureau of Outdoor Recreation and the State Inter-Agency Council for Outdoor Recreation. (See Section 4A, Project Proposal Assurances) Also, the school district would agree to perform in accordance with the terms of the Land and Water Conservation Fund Act of 1965.

Section 432.070, RSMo 1959, prohibits any school district from making any contract which is not within the scope of its powers or expressly authorized by law.

"No county, city, town, village, school township, school district or other municipal corporation shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law, nor unless such contract be made upon a consideration wholly to be performed or executed subsequent to the making of the contract; and such contract, including the consideration, shall be

Mr. Robert L. Dunkeson

in writing and dated when made, and shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing." (Section 423.070, RSMo 1959)

In this instance there is a statute, Section 177.101, RSMo Supp. 1967, which provides the authority for this six director district to enter into a project of this type.

"1. In six-director districts as specified in this section, the school board may establish and maintain public parks and playgrounds for the use of the public school district, and may appropriate the sums they deem proper for the support thereof, not to exceed in any one year two thousand five hundred dollars for districts in cities of twenty thousand and under one hundred thousand inhabitants, and not to exceed five hundred dollars for districts in cities of five thousand and under twenty thousand inhabitants, and not to exceed two hundred and fifty dollars for districts in cities of one thousand and under five thousand inhabitants.

"2. The school board may lease or purchase grounds additional to the schoolhouse site, either adjacent thereto or elsewhere in the school district, for libraries, public parks and playgrounds and pay for the grounds so leased or purchased out of the funds of the school district available for the purpose.

"3. The board of education shall have full custody and control of the parks and playgrounds including the policing and preservation of order thereon and may permit the use of the grounds that it deems best in the interest of the district. The board shall adopt and enforce, subject to the laws of the state and the ordinances of the city, suitable rules and regulations for the control of the grounds and the conduct of persons using them." (Section 177.101, RSMo Supp. 1967)

This section does not apply to all six director school districts but is restricted in its application to those ". . . six-director districts as specified in this section, . . ." The six director

Mr. Robert L. Dunkeson

school district covered by this section are school districts in cities having more than one thousand but less than one hundred thousand inhabitants. The Doniphan R-I School District is a six director district in a city having less than five thousand but more than one thousand inhabitants.

The second paragraph of Section 177.101 authorizes the school board of a qualifying district to purchase land adjacent to a schoolhouse site or elsewhere in the school district for a public park and to pay for this land out of school district funds. In the instant case, the land which the R-I School District of Doniphan proposes to acquire is adjacent to other land owned by the district and, presumably, adjacent to the schoolhouse site. However, if it is not adjacent to the schoolhouse site, it is certainly land located in the school district. The purchase must be made out of school district funds available for the purpose. Section 177.101 (2). A grant to the Doniphan R-I School District by the State Inter-Agency Council for Outdoor Recreation would make funds available to the school district for the purchase of land for a public park. See Opinion No. 190, dated July 13, 1967, rendered to you which reaches a similar conclusion.

Nothing in the terms and conditions imposed by the federal government would remove from the Doniphan School Board the custody and control of the twenty-two acres in question contemplated by paragraph 3 of Section 177.101. The school board would agree to use the area in conformity with the Project Proposal until a different use is approved by the Bureau of Outdoor Recreation and for the State Inter-Agency Council for Outdoor Recreation. The school board has made the determination that the combination school and community use outlined in the proposal is in the best interests of the school district. See paragraph 3, Section 177.101. That land purchased and maintained pursuant to Section 177.101 would be available for both public and school use appears to be what the legislature intended in enacting this legislation. See paragraph 1, Section 177.101, which provides that certain school districts ". . . may establish and maintain public parks . . . for the use of the public school district, . . ." (Emphasis supplied). This section does not give the school board authority to purchase and maintain land for any purposes other than a public park, a playground or a library. Therefore, the board's assurance as part of its agreement with your agency to maintain the land as a public park for school and community use is consistent with the requirements of and authority granted by Section 177.101.

Notice should be taken of one additional provision of Section 177.101. In the first paragraph thereof, the six director school district in a city having a population of over one thousand and under five thousand inhabitants is permitted to appropriate from

Mr. Robert L. Dunkeson

the funds of the school district only up to two hundred fifty dollars for the support of a public park purchased pursuant to this section. In paragraph 4A of the Project Proposal Assurances the school district warrants that it has the ability to finance the operation and maintenance of the facility being developed according to certain standards. The Doniphan R-I School District's ability to perform this assurance is limited by the foregoing restriction on the amount which can be appropriated from the funds of the school district.

CONCLUSION

Therefore, it is the opinion of this office that, subject to the restrictions set forth in Section 177.101, RSMo Supp. 1967, the Doniphan R-I School District may enter into an agreement with the State Inter-Agency Council for Outdoor Recreation for a grant-in-aid from the Federal Land and Water Conservation Fund to assist the school district in the purchase of a school-community park.

The foregoing opinion, which I hereby approve, was prepared by my Assistant D. Brook Bartlett.

Yours very truly,



JOHN C. DANFORTH
Attorney General

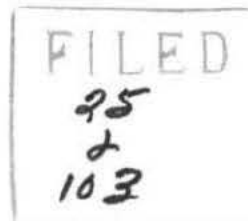
Enclosure: Op. No. 190
7-13-67, Dunkeson

January 22, 1970

OPINION LETTERS 25 and 103

Answered by Gardner

Dexter D. Davis, Commissioner
Department of Agriculture
Jefferson Building
Jefferson City, Missouri 65101



Dear Commissioner Davis:

Reference is made to your recent letters from which it appears that you wish to establish and administer a program for using the money in the Agriculture Emergency Fund for emergency relief and rehabilitation. You request our opinion on the question whether an appropriation must be made by the Legislature in order to use any portion of these funds for administrative purposes.

You state that at the present time Missouri has approximately \$2,800,000.00 in that fund. This money consists of the trust assets of the Missouri Rural Rehabilitation Corporation which had been assigned to the Secretary of Agriculture of the United States and, on application by the Commissioner, returned to the State of Missouri pursuant to the Rural Rehabilitation Corporation Trust Liquidation Act, Public Law 499, 81st Congress, approved May 3, 1950 (64 Stat. 98).

The receipt of money by the State is controlled by Article IV, Section 15, of the Constitution of Missouri, which states in part as follows:

" . . . All revenue collected and moneys received by the state from any source whatsoever shall go promptly into the state treasury, and all interest, income and returns therefrom shall belong to the state. . . . "

Article IV, Section 28, of the Constitution of Missouri, describes the manner in which withdrawals may be made from the state treasury, and reads in part as follows:

Dexter D. Davis, Commissioner -

"No money shall be withdrawn from the state treasury except by warrant drawn in accordance with an appropriation made by law, nor shall any obligation for the payment of money be incurred unless the comptroller certifies it for payment and certifies that the expenditure is within the purpose of the appropriation and that there is in the appropriation an unencumbered balance sufficient to pay it. . . ."

Thus, an appropriation would be required to permit any portion of the Agriculture Emergency Fund to be withdrawn from the state treasury.

The last sentence of Article IV, Section 23, of the Constitution of Missouri, provides:

". . . Every appropriation law shall distinctly specify the amount and purpose of the appropriation without reference to any other law to fix the amount or purpose."

We understand that you suggest that the following provisions be included in the appropriation bill to be submitted to the Legislature at the Emergency Session:

"To the Governor. All money in the Agriculture Emergency Fund for investment, reinvestment, and for emergency agriculture relief and rehabilitation, including administrative expenses."

If the suggested provision is enacted into law, it is apparent that a specific appropriation is made for administrative expense in accordance with requirements of the Constitution of Missouri.

Yours very truly,

JOHN C. DANFORTH
Attorney General

February 24, 1970

Answered by Mansur
OPINION LETTER NO. 106

Honorable Ralph W. Gilchrist
Prosecuting Attorney
Polk County Court House
Bolivar, Missouri 65613



Dear Mr. Gilchrist:

This is in response to your recent letter for an opinion from this office concerning the authority of the county assessor to assess personal property of an incorporated co-operative association, when such property is located in said county and property has been leased to customers of the co-operative.

We are enclosing herewith an opinion issued by this office on July 13, 1953, in which we held personal property belonging to the Pure Milk Producers Association, a co-operative association, organized under Section 274.180 RSMo 1949, is subject to taxation.

We are also enclosing herewith an opinion issued by this office on October 23, 1963, holding that personal property belonging to a corporation leased to another corporation or to an individual may be assessed to the corporate lessor or to the corporate lessee in the county in which the property is located or to the individual lessee in the county where he lives.

We believe these opinions answer the questions you have submitted concerning the assessment of property in the hands of the lessee which is owned by a co-operative organization.

In answer to your question whether Section 53.060, RSMo

Honorable Ralph W. Gilchrist

1959, applies to third class counties, it is our view that it does.

We trust that these previously issued opinions which we are sending you in this letter will be sufficient to answer your questions without the necessity of issuing a formal opinion on this matter.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosures:

Op. 7-13-53, Bush

Op. No. 59
10-23-63, Chapman

USURY:

Loans governed by Missouri usury statutes may not exceed eight per cent interest, even though FHA and VA permit maximum rate of eight and one-half per cent.

OPINION NO. 107

January 9, 1970



Honorable R. J. King, Jr.
Representative - District 39
816 South Hanley Road
Clayton, Missouri 63105

Dear Mr. King:

This official opinion is issued in response to your recent request in which you ask whether FHA and VA insured loans may be made with an interest rate of eight and one-half per cent, as presently authorized by the federal government, in view of the Missouri usury statutes.

Section 408.030, RSMo 1959, provides as follows:

"The parties may agree, in writing, for the payment of interest, not exceeding eight per cent per annum, on money due or to become due on any contract."

The Federal Housing Administration (FHA) and the Veterans' Administration (VA) provide guarantees for certain loans secured by real estate. The purpose of these guarantees is to enable purchasers to buy houses with relatively small down payment. The initial loans are not made by any government agency, but rather are made by certain lenders such as savings and loan associations or banks, to purchasers of houses. We have found no case holding that the initial loan transaction between the individual borrower and the authorized lender is not governed by local law, as to permissible rate of interest or otherwise. See for example *Silver Homes, Inc. v. Marx & Bendorf, Inc.*, 333 S.W.2d 810 (Tenn. 1960).

It is conceivable that a federal agency might be empowered by Congress to make loans which are free from the requirements of the state usury statutes, but discussion along these lines is

Honorable R. J. King, Jr.

academic at the present time because we find nothing in the federal statutes which purports to make state regulation inapplicable. Since FHA does not make loans itself but simply guarantees loans made by private lenders, it appears that state law would apply unless there is an express provision excluding the application of state law.

Some problems relating to FHA and VA guaranteed loans were considered in Opinion No. 506, (1969), a copy of which is enclosed. In that opinion we came to the conclusion that the Missouri statutory provisions which purported to exempt FHA insured loans made by certain lenders from the Missouri usury statutes were unconstitutional, for the reason that they contained a classification of lenders in violation of Article III, Section 44 of the Constitution of Missouri. We are therefore of the opinion that nothing in the Missouri law forecloses the application of Section 408.030, above cited.

We anticipate the contention that FHA and VA guaranteed loans will not be available to Missouri borrowers unless lenders are authorized to charge the maximum interest permitted by federal regulation. The usury statutes, however, were adopted for the protection of borrowers. *Coleman v. Cole*, 158 Mo. 253, 59 S.W. 106 (1900); *Missouri Real Estate Syndicate v. Sims*, 179 Mo. 679, 78 S.W. 1006 (1904). An underlying premise is that one should not borrow money if it is not available to him within the limits specified in the statutes. For many years there was no problem of usury with regard to FHA and VA guaranteed loans, for the reason that the maximum rate permitted by the agency was below the eight per cent rate permitted by Missouri law. If there is a hardship because the agency rate is now higher, the legislature may provide relief. As the statutes now stand, however, a real estate loan is usurious if the interest rate exceeds eight per cent per annum.

Opinion No. 506, enclosed, contains a discussion of the components of interest.

CONCLUSION

The fact that a loan is guaranteed by FHA or VA does not take it out from under the Missouri usury statutes. Even though the federal agency may specify a maximum rate of eight and one-half per cent for loans which it is willing to guarantee, a loan to which the Missouri usury statute applies is usurious if the interest rate exceeds eight per cent per annum.

Honorable R. J. King, Jr.

The foregoing opinion, which I hereby approve, was prepared by my special assistant, Charles B. Blackmar.

Very truly yours,

A handwritten signature in cursive script that reads "John C. Danforth".

JOHN C. DANFORTH
Attorney General

Enclosure. Op. No. 506
12-18-69, Ottinger

SHERIFFS:
COMPENSATION:
FEES, COMPENSATION
AND SALARIES:

The provisions of Senate Bill No. 165 of the 75th General Assembly (Sections 57.407 and 57.409, V.A.M.S.) providing that sheriffs of the third and fourth class counties must pay all fees collected by him in civil matters and which were previously retainable by him into the county treasury apply to commissions earned and received by said sheriffs pursuant to the provisions of Section 57.280 and Section 528.610, RSMo 1959, relating respectively to receiving and paying moneys on executions and to sale of real estate for partition purposes, and such commissions must be paid into the county treasury by such officers.

OPINION NO. 108

January 9, 1970

Honorable Haskell Holman
State Auditor
Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Holman:

This opinion is in response to your request which is stated as follows:

"1. Are the commissions earned and received by sheriffs for receiving and paying moneys on executions as provided in Section 57.280 RSMo., 1959 and commissions earned and received for sale of real estate for the purpose of partition as provided by Section 528.610 RSMo., 1959 deemed to be fees in civil matters and are to be paid into the county treasury by the sheriff under the requirements of paragraph 3 Section 1 and paragraph 3 Section 2 of Senate Bill No. 165 passed by the 75th General Assembly?

"2. In view of the requirements pertaining to fees collected in civil matters, contained in the paragraphs and Sections previously referred to, should the sheriffs charge to and collect from the county any fees in civil matters which are chargeable to and payable by the county?"

The provisions that you refer to are now contained in Sections 57.407 and 57.409 as numbered by the Revisor of Statutes. The third paragraph of each of these two sections refer to the

Honorable Haskell Holman

disposition of civil fees.

Paragraph 3 of Section 57.407 states:

"3. In counties of the third class after October 13, 1969, the sheriff shall pay all fees collected by him in civil matters, and which were previously retainable by him, into the county treasury, except charges for each mile traveled, allowable to him, which he may retain, in serving civil process."

Paragraph 3 of Section 57.409 states:

"3. In counties of the fourth class after October 13, 1969, the sheriff shall pay all fees collected by him in civil matters, and which were previously retainable by him, into the county treasury, except charges for each mile traveled, allowable to him, which he may retain, in serving civil process."

As you have stated, the sheriffs under Section 57.280, RSMo 1959, are allowed commissions for receiving and paying moneys on execution or other process. Section 528.610, RSMo 1959, authorizes sheriffs to receive compensation for making a sale of real estate under the provisions of Chapter 528 relating to partition suits.

In our view, these commissions constitute fees collected by the sheriff in civil matters within the meaning of the third paragraphs of Sections 57.407 and 57.409, V.A.M.S., and as such, are not retainable by said sheriff, but must be paid into the county treasury.

CONCLUSION

It is therefore the opinion of this office that the provisions of Senate Bill No. 165 of the 75th General Assembly (Sections 57.407 and 57.409, V.A.M.S.) providing that sheriffs of the third and fourth class counties must pay all fees collected by him in civil matters and which were previously retainable by him into the county treasury apply to commissions earned and received by said sheriffs pursuant to the provisions of Section 57.280 and Section 528.610, RSMo 1959, relating respectively to receiving and paying moneys on executions and to sale of real estate for partition purposes, and such commissions must be paid into the county treasury by such officers.

Honorable Haskell Holman

The foregoing opinion, which I hereby approve, was prepared by my assistant John C. Klaffenbach.

Yours very truly,

A handwritten signature in cursive script, reading "John C. Danforth". The signature is written in dark ink and is positioned above the printed name.

JOHN C. DANFORTH
Attorney General

SHERIFFS: Under the provisions of Section 1 of House
DEPUTY SHERIFFS: Bill No. 264 of the 75th General Assembly
(Section 57.295, V.A.M.S.) relating to
uniform allowances of \$25 per month for sheriffs and full-time
deputy sheriffs who wear an official uniform in the performance
of their duties, the county court has the discretion to determine
whether or not such allowances shall be made to such officers
and may make such allowances for such periods as the county court
deems proper. However, the county court does not have the author-
ity to vary the amount of the monthly allowances from that fixed
by the act, nor to provide the allowance for one such officer to
the exclusion of the other such officers.

OPINION NO. 109

January 9, 1970

Honorable George J. Pruneau
Prosecuting Attorney
Wayne County Courthouse
Greenville, Missouri 63944



Dear Mr. Pruneau:

This opinion is in response to your request for an inter-
pretation of Section 1 of House Bill No. 264 of the 75th General
Assembly which pertains to uniform allowances for sheriffs and
full-time deputy sheriffs. That section has been numbered as
Section 57.295 by the Revisor of Statutes.

Your question is as follows:

"Does this Bill mean that it is at the
discretion of the County Court as to
whether or not a uniform allowance may
be paid, or does it mean that the uni-
form allowance shall be paid and it is
at the discretion of the County Court as
to whether payment will be made monthly,
on a salary warrant, etc."

Section 57.295 states:

"In each county of this state the sheriff
and each full-time deputy sheriff shall
receive twenty-five dollars per month, as
a uniform allowance, to be paid to him
monthly out of the county treasury at the
discretion of the county court. This
allowance shall apply only to sheriffs and
deputy sheriffs who wear an official uni-
form in performance of their duty."

Honorable George J. Pruneau

The history of this legislation is interesting; that is, House Bill No. 264, Section 1, upon its introduction related only to such uniform allowances and did not contain any discretionary terminology. In its perfected form the bill stated that the money was payable monthly out of the county treasury "at the discretion of the sheriff". The Senate Committee Substitute for the bill changed the language to "at the discretion of the county court" and this change, of course, was retained in final passage.

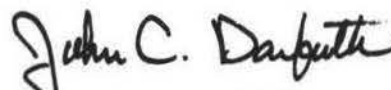
It is our view that it was the intent of the legislature to give the various county courts the option to pay out of the county treasury the uniform allowances as authorized by the provisions of the act. The court may make such allowances for such periods as the court deems proper. However, the terminology employed by the legislature shows that the legislature did not intend that the county court would have the authority to vary the amount of the monthly allowance or to make the allowance for one such officer of the county to the exclusion of the other such officers. The allowance, of course, only applies to such officers who wear an official uniform in the performance of their duties.

CONCLUSION

It is therefore the opinion of this office that under the provisions of Section 1 of House Bill No. 264 of the 75th General Assembly (Section 57.295, V.A.M.S.) relating to uniform allowances of \$25 per month for sheriffs and full-time deputy sheriffs who wear an official uniform in the performance of their duties, the county court has the discretion to determine whether or not such allowances shall be made to such officers and may make such allowances for such periods as the county court deems proper. However, the county court does not have the authority to vary the amount of the monthly allowances from that fixed by the act, nor to provide the allowance for one such officer to the exclusion of the other such officers.

The foregoing opinion, which I hereby approve, was prepared by my assistant John C. Klaffenbach.

Yours very truly,



JOHN C. DANFORTH
Attorney General

STATE TREASURER:
DIRECTOR OF REVENUE:
SALES TAX:
TAXATION (SALES TAX):

The legislature may not impose the duties set forth in the City Sales Tax Act upon the State Treasurer, but that the portion of the act imposing these duties can be severed from the balance of the act.

OPINION NO. 110

January 12, 1970

Honorable William E. Robinson
State Treasurer
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Robinson:

You have recently requested that we advise you with regard to your responsibility to perform certain duties that are set forth in the City Sales Tax Act enacted by the 75th General Assembly. House Committee Substitute for House Bill No. 243 was enacted by the 75th General Assembly and is to be cited as the "City Sales Tax Act." Generally, this act enables certain cities, as therein defined, to impose a sales tax for the benefit of the city. Section 2 of the act provides that the city may, by majority vote of its governing body, impose the tax, provided that the proposed tax be approved by a majority of the citizens of the city.

Within ten days after the adoption of the ordinance, the city clerk is to forward to the Director of Revenue of the State of Missouri, a copy of the ordinance which is to reflect the effective date thereof. The tax is to become effective on the first day of the second calendar quarter after the Director of Revenue receives notice of adoption of the tax. The tax is to be implemented, generally, in accordance with the state sales tax set forth in Sections 144.010 to 144.510, RSMo.

Section 4 of the act provides that:

" . . . the director of revenue shall perform all functions incident to the administration, collection, enforcement, and operation of the tax, and the director of revenue shall collect in addition to the sales tax for the state of Missouri the additional tax authorized under the authority of this act. . . ."

The Director of Revenue is authorized to establish administrative rules and regulations for the collection of the tax.

Honorable William E. Robinson

Section 6 of the act provides:

"1. All city sales taxes collected by the director of revenue under this act on behalf of any city, less two percent for cost of collection which shall be deposited in the state's general revenue fund after payment of premiums for surety bonds as provided in this act, shall be deposited with the state treasurer in a special trust fund, which is hereby created, to be known as the 'City Sales Tax Trust Fund.' The moneys in the city sales tax trust fund shall not be deemed to be state funds and shall not be commingled with any funds of the state. The director of revenue shall keep accurate records of the amount of money in the trust fund which was collected in each city imposing a city sales tax, and the records shall be open to the inspection of officers of the city and the public. Not later than the tenth day of each month the state treasurer shall distribute all moneys deposited in the trust fund during the preceding month, to the city treasurer, or such other officer as may be designated by the city ordinance, of each city imposing the tax authorized by this act, the sum due the city as certified by the director of revenue."

In addition, under Section 6(2) the Director of Revenue **may** authorize the State Treasurer to make refunds from the amounts in the trust fund and, if the tax is abolished, the Director **of** Revenue shall authorize the State Treasurer, under certain circumstances, to remit the balance in the account to the city and to close the account of that city.

The Director of Revenue is to annually report on his management of the trust fund and is to provide a detailed accounting of the source of all funds received by him for the city.

Article IV, Section 15 of the Constitution of Missouri provides in part:

". . . No duty shall be imposed on the state treasurer by law which is not related to the receipt, investment, custody and disbursement of state funds."

You have asked whether the legislature may constitutionally impose the duties set forth in Section 6 of the City Sales Tax Act upon the State Treasurer.

Honorable William E. Robinson

For the reasons discussed below, it is our opinion that the legislature may not do so.

That portion of Section 15 of Article IV of the Constitution quoted above was discussed in *Petition of Board of Public Buildings*, 363 S.W.2d 598 (Mo. en banc 1962). There, the State Treasurer was required under a resolution passed by the Board of Public Buildings to handle the proceeds of revenue bonds that were to be issued to finance the office building located in Kansas City, Missouri. The court stated:

"Inasmuch as all this money is in the nature of a special state fund, we see nothing violative of the substantive intent and meaning of §15, Art. 4 in designating the State Treasurer as the one to have custody of the funds. . . . The statutes in question do not provide that the State Treasurer shall be the custodian; in fact they are silent as to the custody. The law has not imposed this duty on the Treasurer; and the prohibition runs against the legislature. . . ." loc. cit. 363 S.W.2d 598, 608

The court ultimately decided that the duties imposed upon the State Treasurer did not violate the constitutional prohibition. However, the court there specifically relied upon its characterization of the revenues as state funds.

In Section 6 of the City Sales Tax Act the legislature has clearly stated that the moneys in the trust fund "shall not be deemed to be state funds." It is also apparent that the legislature has imposed certain duties on the State Treasurer. The moneys received are to be deposited with the State Treasurer and he is to distribute the funds monthly to the appropriate city official. Refunds are to be made by the Treasurer upon the direction of the Director of Revenue. It is our opinion that to the extent that the legislation imposes duties upon the State Treasurer to retain custody of and to disburse non-state funds, the act is unconstitutional.

Although we believe that the City Sales Tax Act is ineffective to the extent that it requires the Treasurer to perform duties with regard to non-state funds, it is not our opinion that the entire act is invalid for that reason. Section 1.140, RSMo 1959, provides:

"The provisions of every statute are severable. If any provision of a statute is found by a court of competent jurisdiction to be unconstitutional, the remaining provisions of the statute

Honorable William E. Robinson

are valid unless the court finds the valid provisions of the statute are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one; or unless the court finds that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent."

It is apparent that the primary purpose of the City Sales Tax Act was to enable the cities to provide for their revenue needs by establishing a sales tax. Because the Department of Revenue of the State of Missouri has in existence collection procedures established for the collection of the State Sales Tax, it appears reasonable to assume a legislative intent to utilize the staff of the Department of Revenue to efficiently collect the tax. That the Director of Revenue is the primary collector of the tax is demonstrated in Section 4 which provides that the:

" . . . director of revenue shall perform all functions incident to the administration, collection, enforcement and operation of the tax, . . . "

The establishment of the tax is dependent upon the action of each city and the basic collection procedure rests with the Department of Revenue. The role of the Treasurer is neither essential nor inseparably connected with the valid provisions of the act. Since the Treasurer may not participate in handling these funds, the Director of Revenue must retain the funds and disburse them to the city officials, monthly. The Director of Revenue must, in any case, have custody of these funds initially and the Director of Revenue is required to specify the amounts to be disbursed, and therefore this additional duty may be properly inferred from the statutory language.

The Director of Revenue performs similar functions with regard to the taxes imposed by Chapters 146 and 148. In *City of Fulton v. Home Trust Co.*, 336 Mo. 239, 78 S.W.2d 445 (1934) the court had occasion to construe a statute under which a tax collector was to remit monthly the funds he received. The statute was silent as to the handling of these moneys in the interim. The court concluded that, by implication, the tax collector was to retain these funds until the date upon which they were to be turned over. Thus, the duties which the Treasurer was to perform are not alien to the Office of the Director of Revenue and can be appropriately

Honorable William E. Robinson

performed by him. Section 4 of the act provides that the Director of Revenue "shall perform all functions incident to the . . . operation of the tax. . . ." The Director of Revenue, therefore, shall perform those duties which were improperly placed upon the Treasurer.

The judicial test to determine whether an unconstitutional provision in a statute can be severed from the valid provision is set forth in *State ex rel. Transport Manufacturing and Equipment Co. v. Bates*, 359 Mo. 1002, 224 S.W.2d 996, 1001 (en banc 1949). The court there stated the test as follows:

" . . . It is generally true if the invalid provision of a statute and the residue thereof are wholly independent of each other, readily separable, and completely distinct; and if the residue is of itself complete, sensible and capable of being executed that the invalid provision will fall and the residue of the statute will stand." loc. cit. 224 S.W.2d 996, 1001

Since the tax can be established and collected without the participation of the Treasurer, it is complete and capable of being executed. A further test of whether the valid statutory provisions may be enforced is set forth in *Jackman v. Century Brick Corporation of America*, 412 S.W.2d 111, 114-115 (Mo. 1967). There the court stated that if the eliminated portion of the statute results in legislation entirely different from that which the legislature intended then the entire legislation is invalid. It is apparent, here, that the legislature intended to allow the cities to establish a sales tax and to have this tax collected by the Department of Revenue. These essential features will remain.

In *Barhorst v. City of St. Louis*, 423 S.W.2d 843, 851 (Mo. en banc 1967) enabling legislation through which the City of St. Louis was allowed to enact an earnings tax and the city ordinance establishing the tax were considered by the court. The plaintiffs contended inter alia that a particular group of citizens to whom the tax applied was the subject of discrimination and that the plaintiffs could assert this constitutional deficiency although it did not involve any of the plaintiffs since discrimination as to one group would render the entire act unconstitutional. The court determined that the portion of the law to which plaintiffs objected could be severed from the entire act and, therefore, the plaintiffs had no standing to challenge the act in its entirety. Thus, the invalidity of a severable portion of a statute permitting a city to impose a tax will not invalidate the tax enacted by the city.

CONCLUSION

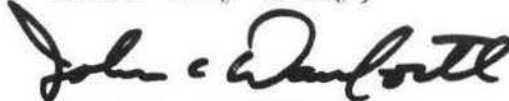
It is, therefore, our opinion that the legislature may not impose the duties set forth in the City Sales Tax Act upon the State

Honorable William E. Robinson

Treasurer, but that the portion of the act imposing these duties can be severed from the balance of the act.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John Craft.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being the most prominent.

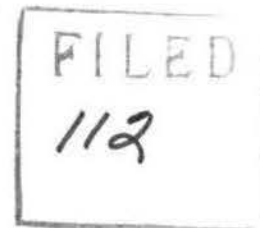
JOHN C. DANFORTH
Attorney General

COUNTY ASSESSOR:

A person holding the office of county assessor when payments are due under Section 53.143 Mo. Supp. 1967 is entitled to such payments.

OPINION NO. 112

March 9, 1970



Honorable Ronald R. McKenzie
Prosecuting Attorney of
Marion County
B & L Building, 3rd &
Broadway
Hannibal, Missouri 63401

Dear Mr. McKenzie:

This is in response to your request for an opinion from this office as follows:

"I am sure that you are aware that Governor Hearnes has appointed James Riney, Marion County Assessor, to the position of Chairman of the Missouri State Tax Commission. I anticipate that Mr. Riney will resign on approximately January 31, 1970, from his present position as Marion County Assessor at which time he will take over his new position.

"As you know, the Assessor's salary is paid considerably different than anyother office in county government. The Missouri Statutes require that the County Assessor turn over the county tax books over to the County Clerk the first day of June the current taxable year. At this time final settlement is made by the Assessor for

Honorable Ronald R. McKenzie

salaries and expenses incurred in assessing and preparing and making the tax books during the period from June 1 to June 1.

"At the time of the resignation of Mr. Riney as County Assessor on January 31, 1970, he will have worked as County Assessor and incurred the expenses that are necessary to operate that office for the period of eight months since June 1, 1969, at no financial benefit to himself and no reimbursements for secretary and other expenses necessary to properly operate this office, with the exception of the 15% of his last year's salary from the County and the State for the month of January, 1970, as recently passed by the Legislature. This partial payment will amount to approximately \$2200.00. Mr. Riney states that his secretary alone for this 8 months period will be \$24000.00, not to mention other expenses and a reasonable salary for himself.

"Accordingly, I would appreciate your advising the undersigned what salary and what expenses such an outgoing Assessor might be entitled to for the period June 1 through December 31, 1969, from whom such payment should be forthcoming and whether to be made by the County Court or the State of Missouri, as well as any other information you may have that would help clarify this matter."

We understand the period you inquire about actually is from June 1, 1969 to January 31, 1970.

We have been informed by Mr. Riney that the only question involved in this opinion request is determining the fees he is entitled to receive from June 1969, when he made his last settlement and, until he resigned in January 1970 for the assessment lists of real and personal property and entries in the property tax books he made during this period of time. There is no question involved requiring reimbursement for mileage or any other compensation due him during this period of time.

We are enclosing herewith Opinion No. 81 issued by this office

Honorable Ronald R. McKenzie

on April 7, 1954, holding a person appointed to fill a vacancy in the office of county assessor in a third class county, holds the office until September 1 following the general election in November, at which time a successor is elected.

Marion County is a third class county not under township organization.

Chapter 53, RSMo 1959, provides for the office of county assessor.

Section 53.010, RSMo 1959, provides for the election of a county assessor at the general election in November who shall assume the duties of office on September 1 for a term of four years.

The county assessor in the third class county is compensated for his services on a fee basis. He is not entitled to any compensation until he performs an act for which a fee is allowed by statute, and at the time and manner as provided by statute.

The general rule in regard to the compensation of public officials is stated in *Nodaway County v. Kidder*, 129 S.W.2d 857, 1.c. 860 as follows:

"The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too must be strictly construed as against the officer. . . ."

In order to understand the issues involved in this matter, possibly it is best to discuss in general the duties of the assessor in a third class county.

Section 137.115, RSMo 1959, provides that the assessor and his deputies, between the first day of January and the first day of June, shall call on each person liable for assessment and, require such person to make a correct statement of all real estate and personal property owned by such person subject to tax, which list shall be delivered to the assessor. Under Section 137.155, RSMo 1959, the list and oath shall be filed by the assessor, after he has completed his assessment books, with the county clerk. Under Section 137.245, RSMo 1959, the assessor shall make out and return to the county clerk on or before the 31st day of May, the assessment books. Under

Honorable Ronald R. McKenzie

Section 53.130, RSMo 1959, the assessor in a third class county receives 65 cents for each assessment list and 8 cents per entry he makes on real estate and tangible personal property books, one half of which is paid by the County and one half by the State. Section 53.147, Mo. Supp. 1967, provides that the county clerk not later than June the 15th of each year shall determine from the tax books and assessor's list filed in his office by the county assessor the compensation due the assessor for the work he performed while in office and certify to the county treasurer and to the State Director of Revenue, the amount due for the current 12 month period. These fees are not due and payable until June 15th of each year.

Under these statutes, the assessor in a third class county formerly was required to wait until June 15th of each year before receiving any compensation he earned in fees for the work he performed after June of the preceding year. Apparently with this in mind, the legislature enacted Section 53.143 Mo. Supp. 1967.

Section 53.143, Mo. Supp. 1967, provides:

"1. Every county assessor in a third class county, except counties having township organization, shall receive his compensation for the twelve month period beginning September first and ending August thirty-first, in the following manner: On the last day of January and on the last day of each of the next consecutive four months he shall receive from the county and from the state, a sum equal to fifteen per cent of the amount due from each of them to the assessor of that county in the preceding twelve month period. As soon as practical thereafter, he shall receive an amount from the county and from the state which, when added to the amounts received in the preceding five payments from each of them, will result in his having received the total compensation due him for the twelve month period.

"2. Any assessor who receives an amount greater than the total amount to which he is entitled for the twelve month period because of the operation of subsection 1 shall immediately reimburse the state treasurer and the

Honorable Ronald R. McKenzie

treasurer of his county for any overpayment and shall be liable personally and on his bond for any overpayment received by him."

Under this statute, the assessor in a third class county is entitled to receive 15% of the amount previously paid the county assessor for the preceding year, payments to be made January 31 and on the last day of each the next succeeding four months. This is the method to be used in estimating the fees to be earned during the current year.

This statute provides for making payments of compensation to the assessor prior to the final settlement. The amount of each payment is not based upon the amount he has earned in fees, up to the time of payment, but the amount paid the assessor in fees during the preceding term is used as the basis for estimating the compensation to be paid in advance of his final settlement. Absent this statute, the assessor would not be entitled to any compensation until final settlement is made in June, at which time he would receive all the compensation he earned in fees from September 1 to August 31. Under this statute, however, when final settlement is made, an adjustment is to be made in the amount of compensation that the assessor is entitled to receive and if the payments advanced are in excess of the amount he has earned in fees, the excess must be refunded and if he earned more than was advanced, he is entitled to the additional compensation. The amount would be governed by the fees he earned for the work he performed while in office. If more than one person has held the office during the current term, the amount of compensation each would be entitled to receive would depend upon the fees he earned for the work he performed while in office.

It is our view that advanced payments made under Section 53.143, supra, are made to the person holding the office of assessor on the date these payments become due and the actual amount of compensation which each assessor is entitled to receive is to be determined on the final settlement in June.

CONCLUSION

It is the opinion of this office that:

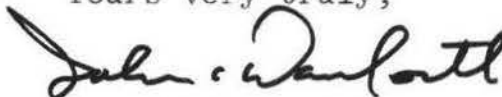
1. When an assessor, in a third class county, resigns his office, he is entitled to the fees he earned in making the assessment lists and entries in the property tax books while holding the office, the payments to be made by the county and state when settlement is made in June, one half to be paid by the county and one half by the state.

Honorable Ronald R. McKenzie

2. The payments to be made as provided under Section 53. 143, supra, of 15% of the amount due the assessor in the preceding 12 month period on January 31 and the last day of the next four months are to be made to the persons holding the office on the date they become due as provided in the statute.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,

A handwritten signature in cursive script, reading "John C. Danforth".

JOHN C. DANFORTH
Attorney General

Enclosure:

Op. No. 81
4-7-54, Settle

COUNTY COLLECTOR: 1. A county collector of a third class county
TAXATION: in his discretion may deposit tax money paid
under protest and impounded pursuant to Senate
Bill No. 39, 75th General Assembly, in interest-bearing time deposit
accounts. 2. The interest earned on deposits of taxes paid under
protest shall be paid to the person who is found to be entitled to
the impounded money.

OPINION NO. 113

June 15, 1970

Honorable James Millan
Prosecuting Attorney
Pike County Court House
Bowling Green, Missouri 63334



Dear Mr. Millan:

This official opinion is issued in response to the request contained in your letter concerning the investment of protested tax funds by a third class county collector, and the use of income received from such investment.

More specifically, the questions raised are as follows:

1. "May he place these in an interest-bearing savings account or certificate of deposit?
2. "If the previous question is answered in the affirmative, what happens to the interest that these funds draw when the matter is finally determined?"

The moneys in question are held by the collectors pursuant to the provisions of Senate Bill No. 39, 75th General Assembly (Section 139.031, RSMo) which in pertinent part provides as follows:

"Section 2. The collector shall disburse to the proper official all portions of taxes not so protested, and he shall impound in a separate fund all portions of such taxes which are so protested. Every taxpayer protesting the payment of taxes, within ninety days after filing his protest, shall commence an action against the collector by filing a petition for the recovery of the amount

Honorable James Millan

protested in the Circuit Court of the county in which the collector maintains his office. If any taxpayer so protesting his taxes shall fail to commence an action in the Circuit Court for the recovery of the taxes protested within the time herein prescribed, such protest shall become null and void and of no effect, and the collector shall then disburse to the proper official the taxes impounded, as hereinabove provided.

"Section 3. Trial of the action in the Circuit Court shall be in the manner prescribed for non-jury civil proceedings, and, after determination of the issues, the court shall make such orders as may be just and equitable to refund to the taxpayer all or any part of the taxes paid under protest or to authorize the collector to release and disburse all or any part of the impounded taxes. Either party to the proceedings may appeal the determination of the Circuit Court.

* * *

"Section 5. No taxpayer shall receive any interest on any money paid in by him either erroneously or under protest."

The law sets forth detailed procedures for handling funds by county collectors of revenue. It is clearly intended that moneys collected be transmitted to the proper public authority entitled to receive the same on a periodic basis at frequent intervals.

Section 139.210, RSMo 1959, states:

"1. Every county collector and ex officio county collector, except in the city of St. Louis, shall, on or before the fifth day of each month, file with the county clerk a detailed statement, verified by affidavit of all state, county, school, road and municipal taxes, and of all licenses by him collected during the preceding month, and shall, on or before the fifteenth day of the month, pay the same, less his commissions, into the county treasuries and to the director of revenue." (Emphasis supplied)

Section 139.220, RSMo 1959, provides:

"Every collector of revenue having made settlement, according to law, of county revenue by him collected or received, shall pay the amount found due into the county treasury, and the treasurer shall give him duplicate receipts therefor, one of which shall be filed in the office of the clerk of the county court, who shall give him full quietus under the

seal of the court."

Section 139.230, RSMo 1959, provides:

"1. Every county collector shall, on or before the fifteenth day of each month, pay to the director of revenue all state taxes and licenses received by him prior to the first day of the month."

Section 52.020, RSMo 1959, states:

*

*

*

"2. In all third and fourth class counties the county court may require the county collector to deposit daily all collections of money in the depositories selected by the county court in accordance with the provisions of sections 110.130 to 110.150, RSMo, to the credit of a fund to be known as 'County Collector's Fund.' * * * "

"3. The collector shall not check on the county collector's fund except for the purpose of making the monthly distribution of taxes and licenses collected for distribution as provided by law or for balancing accounts among different depositories."

In connection with school taxes, Section 165.348, RSMo 1959, states:

"The county collector in counties of the third and fourth classes, except in counties under township organization, shall pay over to the county treasurer at least once in every month all moneys received and collected by him which are due the board of education and shall take duplicate receipts therefor, one of which he shall file in his settlement with the county court. * * * "

Senate Bill No. 39 provides that protested tax funds are to be handled outside the usual procedures by impoundment in a separate fund to be held for ninety days or until the circuit court orders its disposition if a lawsuit is filed. The statute is silent as to how the impounded money is to be handled but it is apparent that during this period of impoundment the collector has the duty of safeguarding the fund. City of Fayette vs. Silvey, 290 S.W. 1019 (K.C.App.1926).

In the case of City of Fulton vs. Home Trust Company, 78 S.W.2d 445 (Mo.S.Ct.1934) a city collector collected certain funds which he was to turn over to the city treasurer monthly. It was his practice to deposit funds that he received during the month in demand deposits and then to transfer these funds at the end of each month by check

Honorable James Millan

to the city treasurer. The bank in which the collector deposited his monthly receipts failed and was placed under the control of the state commissioner of finance at a time when a substantial balance had accumulated pending transfer to the city treasurer. In determining whether the collector had authority to deposit this money in his hands in a bank for safekeeping the court said:

" * * * The fund in controversy, being the total, as stated, of numerous daily collections made by Brown as city collector during the month, was therefore being lawfully held and retained by him as city collector. * * * He was the legal custodian of these funds and certainly was authorized and warranted in depositing them, from time to time during the month, as received, in a bank for safe-keeping, if he chose to do so, and his act in so doing was not in violation or contravention of any statute or ordinance.

* * * " Loc.cit. 78 S.W.2d 447.

It is apparent that inasmuch as the statutes do not control or designate the manner in which the collector is to handle these impounded tax moneys it is lawful for him to deposit them for safekeeping. In re Hunter's Bank of New Madrid, 30 S.W.2d 782 (Spr.App.1930); City of Aurora vs. Bank of Aurora, 52 S.W.2d 496 (Spr.App.1932).

Assuming then that the impounded tax moneys may be deposited by the collector of revenue, may such deposits be time deposits on which interest is received?

This office has previously held in Opinion No. 177, dated December 20, 1963, issued to Robert B. Mackey, a copy of which is attached, that county courts in making deposits of county funds are not limited to demand deposits, but may place a portion of the funds in interest-bearing time deposits. Likewise, in Opinion No. 223, dated October 27, 1969, issued to Senator Don Owens, a copy of which is attached, it was determined that the Director of Revenue in discharging his duty with respect to collection of intangible personal property taxes may deposit for safekeeping the portion of the revenue which he ultimately is to return to the county treasuries and that he may in so doing deposit these moneys in time deposit accounts which draw interest. It is believed that the principles set forth in these opinions are applicable to the matter under consideration. It should be observed that in Opinion No. 177 (Mackey) it was found that the funds could not be placed in certificates of deposit or bonds or other investments.

In the event the impounded funds are placed in time deposits the collector cannot preclude himself from performing his statutory duty to turn over these funds to the proper party at the appropriate time. As stated in Attorney General Opinion No. 223 (supra):

" * * * It would not be proper to enter into a contract which would in any way limit his ability to turn over the funds on the date pre-

Honorable James Millan

scribed by statute. He must be prepared at the appointed time to turn over the funds in his hands. Where this duty can be fulfilled and, at the same time, interest can be obtained, it is the opinion of this office that the authority which allows the deposit of funds in demand deposits provides equal authority to deposit funds in time deposits so that interest may be earned."

With respect to the second question raised in your letter, this office has previously expressed the opinion (Opinion No. 84, May 24, 1965, Lee C. Fine, copy of which is enclosed) that interest earned, the allocation of which is not governed by statute, is viewed as an accretion to the fund which produces it. This opinion was reaffirmed by this office in Opinion No. 223 (supra). Based upon the authority cited therein it is our opinion that the interest earned from the deposit of the impounded tax moneys paid under protest would follow the fund and be paid to the person who is ultimately determined to have the right to the fund.

Although Section 5 of Senate Bill No. 39 states that no taxpayer shall receive any interest on any money paid in by him either erroneously or under protest, it is our view that the legislature intended this section to prohibit the use of public funds for payment of interest on money held in abeyance pending determination of tax liability. This section would not deprive a taxpayer of his right to receive interest on his money invested at interest while impounded.

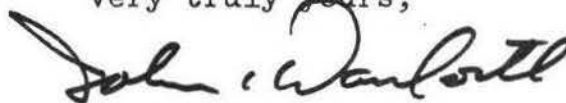
CONCLUSION

It is the opinion of this office that:

1. A county collector of a third class county in his discretion may deposit tax money paid under protest and impounded pursuant to Senate Bill No. 39, 75th General Assembly, in interest-bearing time deposit accounts.
2. The interest earned on deposits of taxes paid under protest shall be paid to the person who is found to be entitled to the impounded money.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John E. Park.

Very truly yours,



JOHN C. DANFORTH
Attorney General

Encls.
OP.177-Mackey-1963
OP.223-Owens-1969
OP.84 -Fine -1965

PUBLIC RECORDS:

Records required by law to be kept by public officials in this state, unless otherwise provided by law, are subject to inspection by any citizen of Missouri under reasonable rules and conditions imposed by the legal custodian of such records and whether the conditions or regulations imposed are reasonable depends upon the conditions and rules imposed in each individual case.

OPINION NO. 114

January 29, 1970



Honorable E. J. Cantrell
Representative - District 33
306 Capitol Building
Jefferson City, Missouri 65101

Dear Representative Cantrell:

This is in response to your request for an opinion from this office as follows:

"I am in quest of your interpretation of Sections 109.180 and 109.190 of the Missouri Revised Statutes concerning the availability of and access to public records."

Section 109.180, RSMo Supp. 1967, provides:

"Except as otherwise provided by law, all state, county and municipal records kept pursuant to statute or ordinance shall at all reasonable times be open for a personal inspection by any citizen of Missouri, and those in charge of the records shall not refuse the privilege to any citizen. Any official who violates the provisions of this section shall be subject to removal or impeachment and in

Honorable E. J. Cantrell

addition shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine not exceeding one hundred dollars, or by confinement in the county jail not exceeding ninety days, or by both the fine and the confinement."

Section 109.190 RSMo Supp. 1967, provides:

"In all cases where the public or any person interested has a right to inspect or take extracts or make copies from any public records, instruments or documents, any person has the right of access to the records, documents or instruments for the purpose of making photographs of them while in the possession, custody and control of the lawful custodian thereof or his authorized deputy. The work shall be done under the supervision of the lawful custodian of the records who may adopt and enforce reasonable rules governing the work. The work shall, where possible, be done in the room where the records, documents or instruments are by law kept, but if that is impossible or impracticable, the work shall be done in another room or place as nearly adjacent to the place of custody as possible to be determined by the custodian of the records. While the work authorized herein is in progress, the lawful custodian of the records may charge the person desiring to make the photographs a reasonable rate for his services or for the services of a deputy to supervise the work and for the use of the room or place where the work is done."

Section 109.180 supra, provides that all records of the state kept pursuant to statute shall at all reasonable times be open for personal inspection by any citizen of Missouri.

Section 109.190 supra, provides that in any case where the public or any person interested has a right to inspect or the right of access to the records it shall be done under the supervision of the lawful custodian of the records who may adopt and enforce rea-

Honorable E. J. Cantrell

sonable rules and regulations.

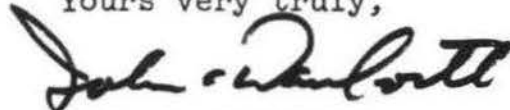
It is our opinion in that under these statutes, a public officer has authority to impose reasonable conditions or regulations as to the time, place and manner of inspection of public records under his control and whether such regulations or conditions are reasonable depends upon the regulations or conditions imposed in each individual case.

CONCLUSION

It is the opinion of this office that records required by law to be kept by public officials in this state, unless otherwise provided by law, are subject to inspection by any citizen of Missouri under reasonable rules and conditions imposed by the legal custodian of such records and whether the conditions or regulations imposed are reasonable depends upon the conditions and rules imposed in each individual case.

The foregoing opinion, which I hereby approve, was prepared by my assistant Moody Mansur.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

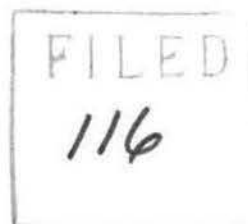
DRAINAGE DISTRICTS:

Drainage Districts organized by the county court may construct new ditches.

OPINION NO. 116

February 16, 1970

Honorable W. D. Hibler, Jr.
State Representative
93rd District
Rural Route
Brunswick, Missouri 65236



Dear Representative Hibler:

This is in response to your letter of January 15, 1970, requesting an opinion from this office as follows:

"I would like to request an official opinion on Section 243.220, Missouri Revised Statutes 1959, relating to Drainage Districts Organized by County Courts, titled, Repairs and Improvements, how made--hearing when cost exceeds maintenance fund--form of notice.

"A particular drainage district in my area wishes to dig a new ditch about three-quarters of a mile long to improve the drainage and removal of excess water from their land. The cost would not be excessive but would be more than the maintenance fund could handle. practically all of the people within the drainage district or in favor of the improvement.

"To clarify my question, what I would like to know is whether new improve-

Honorable W. D. Hibler, Jr.

ments may be constructed in a drainage district under the provisions of Section 243.220 or is the improvements restricted to work on ditches are other improvements already constructed."

The law governing drainage districts, organized by county courts, is found in Chapter 243 RSMo 1959. Drainage districts organized by the county court are under the control and supervision of the county court.

Section 243.220, RSMo 1959, to which you refer provides:

"1. When any ditches or other improvements constructed under this chapter need to be enlarged, cleaned out, obstructions removed therefrom or new work done, five or more of the owners of land originally assessed for the construction of any such ditches, or other improvements, may file a statement in writing with the county clerk setting forth such necessity."

This section further provides that when such petition is filed, the county court shall direct an engineer to view the premises and make a report as to the repairs and improvements necessary and the probable cost of the same. It further provides that if the court finds the improvements shall be made, it shall direct an engineer to make such repairs and improvements and make an itemized report to the court of the expenses incurred all of which shall be paid out of the maintenance fund. It further provides that if the repairs and improvements cannot be made out of the maintenance fund, the court shall set a hearing for levying an additional tax for such improvements as cannot be made out of the maintenance fund and notify the property owners in the district of the meeting by publication in a newspaper.

Section 243.230 provides the procedure to be followed by the county court if the court finds at the hearing that the owners of a majority of the acreage in the district are in favor of making the improvements. It provides that if the court determines that the estimated cost of the improvement exceeds the amount of the maintenance funds, that the court shall make an assessment against the property in the district for the additional cost and direct that it be paid and collected as other drainage taxes.

Honorable W. D. Hibler, Jr.

In State ex rel Ross v. General American Life Insurance Co. 85 S.W.2d 68, the constitutionality of these statutes was sustained. In this case, the court held the statutes authorizing additional assessments for the cleaning of drainage districts and construction of new outlets was constitutional. These statutes have not been materially amended in this respect since this decision was rendered.

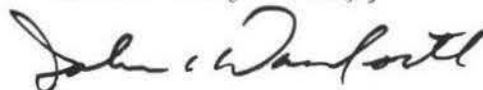
It is clear that under these statutes a drainage district may construct new ditches and use maintenance funds for such purpose, and, if such funds are not sufficient, to levy an additional assessment against the property in the district to defray the additional expenses.

CONCLUSION

It is the opinion of this office that in drainage districts organized by the county court, under Chapter 243 RSMo 1959, new ditches may be constructed and maintenance funds used for such purpose, and if the maintenance funds are not sufficient, an additional assessment may be made to defray the additional expenses.

The foregoing opinion which I hereby approve was prepared by my assistant Moody Mansur.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Answer by letter-Gardner

February 25, 1970

OPINION LETTER NO. 118

Honorable Lawrence J. Lee
State Senator, District 3
506 Olive Street
St. Louis, Missouri



Dear Senator Lee:

This is in response to your recent letter in which you inquire whether there is any provision for a mandatory retirement age of a special commissioner or referee appointed under provisions of Section 476.450 to 476.510, RSMo.

Section 476.450, RSMo, provides as follows:

"Any person having reached the age of sixty-five years and having in this state served an aggregate of twelve years, continuously or otherwise, as a judge or commissioner of the supreme court, or as a judge or commissioner of any of the courts of appeals, or as a circuit judge, or as a judge of a court of criminal correction, or as a judge of a court of common pleas, or either or both as judge or commissioner of any of said courts, and who shall have ceased to hold such office by reason of the expiration of his term, or voluntary resignation or retirement by reason of having reached the age of seventy-five years, under section 25, article V, of the Constitution of Missouri, shall, if he so elects as hereinafter provided, be made, constituted and appointed a special commissioner or referee for and during the remainder of his life and shall, while he remains a resident of Missouri, be entitled to and shall receive as annual compensation,

Honorable Lawrence J. Lee

salary or retirement compensation during the remainder of his life a sum equal in amount to one-third the salary or compensation then or thereafter provided for by law for the office from which he has retired, and said sum shall be payable monthly out of the general revenue of the state of Missouri." (Emphasis added)

Section 476.453, RSMo, provides in part as follows:

"Any person having reached the age of sixty-five years and having served in this state an aggregate of twelve years, continuously or otherwise, as a judge or commissioner of any court mentioned in section 476.450, or having served in this state continuously for six years as a judge of any court mentioned in section 476.450 prior to the effective date of this section, shall, if he so elects, be made, constituted and appointed a special commissioner or referee for and during the remainder of his life, . . ."

Section 476.455, RSMo, provides as follows:

"Any person having reached the age of sixty-five years, and having served an aggregate of twelve years continuously or otherwise as a judge of any of the courts whose judge or judges are required to be selected under the provisions of section 29, article V of the constitution, shall have the same rights and privileges upon the same conditions as are provided for the judges and commissioners specified in section 476.450."

Section 476.456, House Bill No. 216, 75th General Assembly provides as follows:

"1. Any person whether or not a licensed attorney having reached the age of sixty-five years, and having any prior judicial service except as a police judge, or justice of the peace of twelve years or more at the time of the passage of this act or having served an aggregate of twelve years continuously or otherwise as judge or commissioner of any of the courts provided for under the provisions

Honorable Lawrence J. Lee

of sections 16 and 18, article V of the constitution, shall have the same rights and privileges upon the same conditions as are provided for the judges and commissioners specified in section 476.450.

"2. Any judge presently serving as a magistrate or probate judge is entitled to include any time he has served as a justice of the peace of this state in computing the prior judicial service required by this section."

Thus, the principle of judicial retirement in Missouri has been established by the legislature. In this law the elements of judicial retirement include the provision that the former judge remain a special commissioner, if he so elects, for the remainder of his life. This is consistent with the provisions of Section 476.510 which provides that a person who elects to be made and appointed a special commissioner or referee and who accepts the benefits of such appointment ". . . shall not thereafter engage in the practice of law." and Section 476.460, RSMo 1959, which provides as follows:

"Each such special commissioner or referee shall be subject to call by the supreme court for temporary duty in any court of the state to render such duties as may be directed by the supreme court or as may now or hereafter be prescribed by law."

We note that pursuant to this section special commissioners who formerly were judges or commissioners of the appellate courts have continued to do substantial amounts of work for their courts.

It is therefore the opinion of this office that there is no provision for a mandatory retirement age of a special commissioner.

Yours very truly,

JOHN C. DANFORTH
Attorney General

CITIES, TOWNS AND VILLAGES:
TAXATION (CITIES):

A simple majority vote constitutes authorization for a 20 cents tax levy for park purposes in a fourth class city, under 30,000 population, under the provisions of Section 90.500, RSMo Supp. 1967, assuming, of course, that the 20 cents tax levy when combined with the general municipal tax levy does not exceed the constitutional limit of \$1 required by Article X, Section 11(b), Constitution of Missouri.

March 18, 1970

OPINION NO. 119

Honorable Harold Dickson
State Representative
District 121
400 West Russell
California, Missouri 65018



Dear Mr. Dickson:

This is in reply to your request for an official opinion of this office concerning the question whether a fourth class city, under 30,000 population, if approved by a simple majority of the voters, can levy and collect a 20 cents per \$100 assessed valuation tax to be used for park purposes under Section 90.500, providing that the constitutional limit set out in Article X, Section 11(b), Constitution of Missouri, of \$1 per \$100 assessed valuation is not exceeded.

Article X, Section 11(b), as stated in the question, does limit to municipalities, including fourth class cities, an annual tax rate of one dollar on the hundred dollars assessed valuation. The legislature has further limited the annual tax rate for fourth class cities to 75 cents per \$100 assessed valuation. Section 94.250, RSMo 1959. However, this 75 cent limit can be exceeded for special purposes, including 20 cents for park purposes as authorized by Section 90.500 to Section 90.570. Section 94.260(3), RSMo 1959.

You have stated that the present general tax levy of the city in question is 75 cents per \$100 assessed valuation. Therefore, the increase of 20 cents for park purposes would not exceed the constitutional limitation.

The 20 cents tax levy for park purposes is being proposed under the provisions of Section 90.500, RSMo Supp. 1967, which reads as follows:

Honorable Harold Dickson

"When one hundred taxpaying voters of any incorporated city or town having less than thirty thousand inhabitants, or any city of the second or third class, shall petition the mayor and common council asking that an annual tax be levied for the establishment and maintenance of free public parks in the incorporated city or town, and providing for suitable entertainment therein, and shall specify in their petition a rate of taxation not to exceed forty cents per year on each one hundred dollars of assessed valuation, the mayor and common council shall direct the proper officer to give notice of the annual election or special election which may be called for the purpose of voting on the question on ballots in the following form:

'For a.....cent tax for public parks.'

"or

'Against a.....cent tax for public parks.'

"The tax specified in the notice shall be levied and collected in the same manner as other general taxes of the incorporated city or town and shall be known as the park fund. The taxes shall be within the constitutional limitation upon the power of any city to levy taxes and shall cease in case the legal voters of such incorporated city or town shall so determine, by a majority vote at any annual election held therein."

The question, then, is whether a simple majority vote is sufficient to impose this tax.

You have made reference to the municipal park tax authorized by Section 64.755, RSMo Supp. 1967, which specially requires a two-thirds majority for passage.

Section 90.500 does not specifically state what vote is necessary for passage, but does require only a simple majority for repeal.

Enclosed is a copy of Attorney General Opinion No. 143, June 12, 1969, Vanlandingham, which discusses the relationship of Section 90.500 and Section 64.755. That opinion held that the tax provided for by Section 64.755 is one authorized by Article X, Section 11(c), Constitution of Missouri, in excess of the constitutional limit of \$1. It is suggested that the reason for the two-thirds vote is because the tax authorized by Section 64.755 can be above the constitutional limit of \$1.

However, the tax authorized by Section 90.500 must be within the constitutional limit.

Honorable Harold Dickson

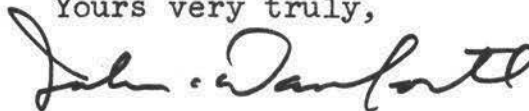
Therefore, in absence of any express provision to the contrary, it is our opinion that the vote required to pass a measure such as the one authorized in Section 90.500 is a simple majority.

CONCLUSION

It is the opinion of this office that a simple majority vote constitutes authorization for a 20 cents tax levy for park purposes in a fourth class city, under 30,000 population, under the provisions of Section 90.500, RSMo Supp. 1967, assuming, of course, that the 20 cents tax levy when combined with the general municipal tax levy does not exceed the constitutional limit of \$1 required by Article X, Section 11(b), Constitution of Missouri.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Walter W. Nowotny, Jr.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

Encls:

OP.143-69-Vanlandingham

Answer by letter-Wood

February 17, 1970

OPINION LETTER NO. 120

L. M. Garner, M.D.
Acting Director
Missouri Division of Health
Broadway State Office Building
Jefferson City, Missouri 65101



Dear Dr. Garner:

You recently inquired if the Division of Health had jurisdiction over cooperatively owned water supply systems for purposes of Sections 192.180 through 192.200, RSMo 1959. We understand that such systems are entirely owned and operated by an association of its consumers, who then, in effect it is contended, are supplying water to themselves. The situation is exemplified by a developer of a subdivision who digs a well to supply water to a group of residential lots, and then sells an interest in the well along with the individual lots until, ultimately, the well is entirely owned by a group of lot owners.

Section 192.180, RSMo 1959, directs the Division of Health to ". . . make and enforce adequate rules and regulations for the maintenance of a safe quality of water dispensed to the public. . . ." The division is to collect samples of, and analyze natural or treated water ". . . furnished by municipalities, corporations, companies, or individuals to the public. . . ." (Section 192.180, RSMo). A municipal corporation, private corporation, company or individual ". . . supplying or authorized to supply water to the public. . . ." must first receive written approval from the Division of Health of the plans of the waterworks, method of purification, and source of supply. (Section 192.200, RSMo). Municipal water supplies approved by the municipality's health department are exempt from the law (Section 192.220, RSMo).

L. M. Garner, M.D.

On November 9, 1962, the Division of Health filed with the Secretary of State its Regulations Governing the Installation, Extension, and Operation of Public Water Supplies. The Regulations define "PUBLIC WATER SUPPLY" as:

" . . . any and all water supply systems furnishing water, whether or not for gain, to more than a single service connection, a community or a municipality."

Generally, statutes pertaining to health measures are liberally construed.

" . . . it is a wholesome and well-recognized rule of law that powers conferred upon boards of health to enable them effectually to perform their important functions in safeguarding the public health should receive a liberal construction. . . ." (State ex rel Horton v. Clark, 9 S.W.2d 635 (Mo. en banc 1928), 39 C.J.S., Health, §9, p. 823)

Reasonable rules of boards of health implementing such statutes will be upheld by the courts barring a clear abuse of discretion (39 C.J.S., Health, §10, p. 824). It is our opinion that the rule of the Division of Health construing the statutory language of supplying, dispensing, or furnishing water "to the public" so as to apply to all water systems with more than a single service connection is a reasonable rule that the courts of this state would uphold. The administrative definition of the term "public" makes it equivalent to the phrase "any other person," which construction, given the nature of the statute and its purposes, is not in our opinion unwarranted. An association of resident lot owners cooperatively owning and operating a water supply system are not only supplying water to themselves but also to one another. A well constructed, owned, and used by a single person or family is one thing, but a well serving more than a single person or family is another matter, and it is this line which we believe the Division of Health has properly drawn to meaningfully implement the statutory mandate.

In State Board of Health v. Crew, 129 A.2d 115 (Md. 1957), the Maryland high court sustained the state health department's closing of a private well (used by a single household) under a statute empowering it to do so when a public water supply was available to the property and the private well "is or may become prejudicial to health."

" . . . The right of the State to require uniform compliance with reasonable standards designed to insure or tend towards the safeguarding

L. M. Garner, M.D.

of the public health by all, or selected groups of its citizens, is basic and firmly established even though compliance deprives the citizen of one or more of the bundle of rights that together comprise ownership or puts him to added expense." (State Board of Health v. Crew, 1.c. 117)

We believe a similar approach would be taken by the courts of this state in sustaining the Division of Health's jurisdiction pursuant to Sections 192.180 through 192.200, RSMo, over cooperatively owned water supply systems serving more than a single household.

Yours very truly,

JOHN C. DANFORTH
Attorney General

SCHOOLS:
COUNTIES:

(1) When real estate belonging to
the county and township school funds
is liquidated pursuant to Article

IX, Section 7 of the Constitution the oil, gas and mineral rights
in such real estate must also be liquidated and may not be reserved
to the county. (2) The proceeds derived from the sale of such real
estate together with those derived from the sale of the oil, gas
and mineral rights shall be credited to the county school fund.

OPINION NO. 121

May 26, 1970

Honorable Raymond Eckles
Prosecuting Attorney
Nodaway County Court House
Maryville, Missouri 64468



Dear Mr. Eckles:

This is in response to your request for an official opinion on
the question as to which fund in Nodaway County should be credited
with the money received for real estate which was sold because it
was situated in another county.

Section 49.285(1), RSMo Supp. 1967, is as follows:

"1. It shall be unlawful for any county of
the third or fourth class to own real estate
situated in any other county of this state
other than a county which adjoins it after
five years from October 13, 1963, or after
five years from the date of acquisition of the
real estate, whichever date last occurs. If
any county subject to these provisions fails
to dispose of such real estate within that
time, the sheriff of the county in which the
land is located shall take possession of the
real estate and sell it at public auction from
the place where and at the hour when partition
sales are normally conducted after giving no-
tice of the sale in the manner prescribed for
partition sales both in the county where the
land is located and in the county owning the
real estate. Proceeds from the sale shall
first be applied to paying the costs of notices
herein prescribed, then to a sheriff's sale
fee not to exceed one hundred dollars and ap-
proved by the circuit court of the county
wherein the real estate is located, then to

Honorable Raymond Eckles

the county owning the real estate. However, all oil, gas and mineral rights shall be reserved to the county when said real estate is sold. The county may, however, lease said rights to third parties and the oil, gas and minerals sold under said lease shall revert to the general revenue fund of the county."

The question presented is whether the sale of such land may be made by the county subject to the provisions of Section 49.285 (1) in view of Article IX, Section 7 of the Constitution which is as follows:

"All real estate, loans and investments now belonging to the various county and township school funds, except those invested as herein-after provided, shall be liquidated without extension of time, and the proceeds thereof and the money on hand now belonging to said school funds of the several counties and the city of St. Louis, shall be reinvested in registered bonds of the United States, or in bonds of the state or in approved bonds of any city or school district thereof, or in bonds or other securities the payment of which are fully guaranteed by the United States, and sacredly preserved as a county school fund. Any county or the city of St. Louis by a majority vote of the qualified electors voting thereon may elect to distribute annually to its schools the proceeds of the liquidated school fund, at the time and in the manner prescribed by law. All interest accruing from investment of the county school fund, the clear proceeds of all penalties, forfeitures and fines collected hereafter for any breach of the penal laws of the state, the net proceeds from the sale of estrays, and all other moneys coming into said funds shall be distributed annually to the schools of the several counties according to law."

We must therefore inquire into the nature of the right of Nodaway County to sell the land in question and the effect of the sale of such land upon that right.

According to the information submitted, the land in question has been appropriated by the United States to the State of Missouri

Honorable Raymond Eckles

for the use of schools. The origin of the school fund in Missouri is described in *State v. Bonner*, 5 Mo.App. 13, 18 (1877) as follows:

"The school-fund of this State had its origin in the act of Congress of March 6, 1820, authorizing the people of the Missouri Territory to form a constitution. By that act it was provided that section 16 of every township shall be granted to the State, for the use of the inhabitants of such township, for the use of schools. An act of the General Assembly of January 31, 1831, provided for the sale of these lands to create a fund for the use of schools. . . ."

In *Maupin v. Parker*, 3 Mo. 310 (1834), our Supreme Court held that these grants were absolute conveyances and that the General Assembly had power to provide for the sale of such lands for the use of schools. This decision was affirmed in *Payne v. St. Louis County*, 8 Mo. 473 (1844). In that case the court held that: ". . . It is beyond controversy, that the United States have no interest whatever in these lands," The court also pointed out, loc. cit. 479:

". . . The Legislature is restricted only by the Constitution of the State. This prevents and prohibits a diversion of the fund from the purpose to which it has been dedicated. The Legislature is required to apply the funds 'arising from these lands,' in strict conformity to the object of the grant. . . ."

The court also indicated that the object of the grant was the advancement of education and the provision of a fund for that purpose.

Article IX, Section 7 of the Constitution of Missouri provides for the liquidation of all real estate belonging to the various county and township school funds and requires that the proceeds derived therefrom be ". . . sacredly preserved as a county school fund. . . ." The legislature may be presumed to have had the constitutional restrictions in mind when it enacted Section 49.285(1) in 1963. *State ex rel. Kessler v. Hackmann*, 264 S.W. 366 (Mo. 1924). Certainly, the legislature must be deemed to have acted with integrity and with a desire to keep within the Constitution in its action. Therefore, when the legislature enacted Section 49.285(1) and made provisions for the reservation of all oil, gas and mineral rights so that when such rights are sold the proceeds arising therefrom ". . . shall revert to the general revenue fund of the county."

Honorable Raymond Eckles

the legislature must have had in mind real estate and investments different from the real estate and investments described in Article IX, Section 7 of the Constitution as belonging to the various county and township school funds. That being true the provisions of Article IX, Section 7 of the Constitution rather than the provisions of Section 49.285(1) applies to liquidation of real estate and investments belonging to the county and township school funds. Accordingly, to comply with this constitutional provision the oil, gas and mineral rights as well as the land itself must be liquidated.

Article IX, Section 7 of the Constitution was considered by the court in State ex rel. School Dist. of Fulton v. Davis, 236 S.W.2d 301 (Mo. en banc 1951). In that case the court stated on page 304:

"More to the point, however is the wording of the constitutional provision itself. After directing the liquidation of all township and county school funds and prescribing the method of reinvestment thereof, it further provides that they shall be sacredly preserved as a county school fund. There can be no doubt of the meaning of that provision. Township and county school funds are thereby merged into one fund, to-wit: a county school fund. So, therefore, when the investments belonging to the county and township school funds of Callaway County were liquidated, in accordance with the constitutional mandate, they became a county school fund. It is unthinkable that when the electors elected to have this county school fund distributed annually, it would again amoeba-like divide into township funds and a county fund so as to require township funds to be distributed on a township basis and the county fund on a county basis. The further wording of the provision states specifically otherwise. It says: 'All interest accruing from investment of the county school fund * * * shall be distributed annually to the schools of the several counties * * *.' Thus, after liquidation of the formerly separate and distinct county school fund and township school funds, both the proceeds of principal and the accruing interest become one fund, namely: the county school fund."

It appears therefore that under Article IX, Section 7 of the Constitution, township and county school funds are merged into one

Honorable Raymond Eckles

fund known as the county school fund, and that the liquidation proceeds of investments of formerly separate and distinct township and county school funds merged into one county school fund.

CONCLUSION

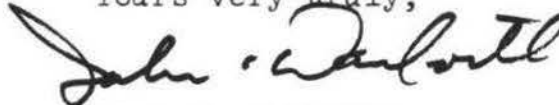
It is the opinion of this office that:

(1) When real estate belonging to the county and township school funds is liquidated pursuant to Article IX, Section 7 of the Constitution the oil, gas and mineral rights in such real estate must also be liquidated and may not be reserved to the county, and

(2) The proceeds derived from the sale of such real estate together with those derived from the sale of the oil, gas and mineral rights shall be credited to the county school fund.

The foregoing opinion, which I hereby approve, was prepared by my Assistant L. J. Gardner.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

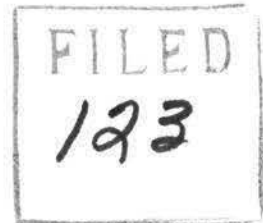
JOHN C. DANFORTH
Attorney General

March 23, 1970

OPINION LETTER NO. 123

(Answered by letter-
Nowotny)

Mr. Oscar J. Chapman
Administrative Dean
Lincoln University
Jefferson City, Missouri 65101



Dear Dean Chapman:

This is in answer to your request for an official opinion of this office, which request reads as follows:

"Lincoln University will begin the operation of its own bookstore on January 27, 1970. Therefore, the Bookstore Committee, of which I am the chairman, wishes to get from the Office of the Attorney General an opinion concerning the following question:

"Will Lincoln University be required to collect and submit to the Department of Revenue the Missouri three (3) percent sales tax on the sales which are transacted by the Lincoln University Bookstore?

"Your opinion concerning the matter indicated above will be greatly appreciated. Thank you."

If such sales are exempt from the sales tax it would be under the provisions of Section 144.040, RSMo 1959, which reads as follows:

"In addition to the exemptions under section 144.030 there shall also be exempted from the provisions of sections 144.010 and 144.510

Mr. Oscar J. Chapman

all sales made by or to religious, charitable, eleemosynary institutions, penal institutions and industries operated by the department of penal institutions or educational institutions supported by public funds or by religious organizations, in the conduct of the regular religious, charitable, eleemosynary, penal or educational functions and activities, and all sales made by or to a state relief agency in the exercise of relief functions and activities."

We note that Lincoln University is an educational institution supported by public funds.

It is our understanding that the bookstore is being established to sell books and education related supplies to students and members of the faculty on a non-profit plan. We find no Missouri authority in point but an exemption is supported by *Squire v. Students Book Corporation*, 191 F.2d 1018, where the United States Court of Appeals held that a corporation wholly owned by an educational institution that sold books and supplies to students and faculty members and returned any and all profits to the educational institution was exempt from federal income taxation as being operated exclusively for an educational purpose. The court noted that the business enterprise in which the taxpayer was engaged bore a close and intimate relationship to the functioning of the college.

An exemption is also supported by the definition of educational purposes in 28 C.J.S., pages 834 and 835:

"A broad phrase, including all those uses which reasonably serve the purposes of education as it is commonly understood. As applied to a school, the term is not limited to purposes of class-room work solely, but includes any activity necessary to the proper maintenance and operation of a school.

Therefore, it is our conclusion that the bookstore is being operated as an educational function or activity of the University and is exempt from the sales tax under Section 144.040, RSMo 1959.

Very truly yours,

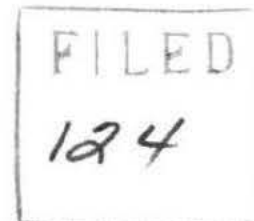
JOHN C. DANFORTH
Attorney General

Answer by letter-Wieler

March 4, 1970

OPINION LETTER NO. 124

Honorable Joe D. Holt
State Representative
District No. 102
Baker Building
Fulton, Missouri 65251



Dear Representative Holt:

This is in response to your request for an opinion clarifying or modifying Opinion Letter No. 295, issued to you on August 29, 1969. In your earlier opinion, you asked if Section 77.330, RSMo 1959, required the mayor of a third class city to submit to each newly elected city council the person he had appointed to the office of city counselor as authorized by ordinance. In answering that request, it was our opinion that the city counselor, once appointed and qualified, held office for the term thereof and until his successor was appointed and qualified, unless he was removed under the provisions of Section 77.340, RSMo 1959, or otherwise. In arriving at this decision, we assumed that the city counselor was appointed for a fixed term of office. However you now desire our opinion where the appointment is not for a fixed term, i.e., the appointment of the city counselor is for an indefinite period of time, without designation as to the end of his term or of a length of term in years, or any other definite determination as to the length of time he should serve.

Section 98.340, RSMo 1959, provides that any third class city ". . . may, by ordinance, provide for the office of city counselor and his duties and compensation. . . ." Where the mayor is authorized by city ordinance to appoint a city counselor, his appointment must be made with the consent and approval of a majority of the members elected to the city council, as set forth in Section 77.330, RSMo 1959. Once appointed and qualified by the mayor and the majority of the city council, a city counselor in a third class

Honorable Joe D. Holt

city where the city ordinances do not set forth a specific term of office holds said office until removed for cause or under the provisions of Section 77.340, RSMo 1959. Said section provides:

" . . . The mayor may, with the consent of a majority of all the members elected to the council, remove from office any appointive officer of the city at will; and any such appointive officer may be so removed by a two-thirds vote of all the members elected to the council, independently of the mayor's approval or recommendation. . . ."

Since he holds office at the pleasure of the appointing power, it is not necessary to resubmit the name of the city counselor to every newly elected city council.

Also, the possibility that such a term of office may exceed four years does not contravene Article VI, Section 10 of the Missouri Constitution which provides:

"The terms of city or county offices shall not exceed four years."

In State ex rel. Kane v. Johnson, 123 Mo. 43, 27 S.W. 399, 401 (1894), the Missouri Supreme Court in dealing with the forerunner of the above constitutional section which also provided that terms of office for city officers should not exceed four years said:

" . . . This section simply means that, when the term of office is fixed by any law or ordinance, it shall not exceed four years, but where it is not fixed, and where it may be terminated at any time, at the pleasure of the appointing power, it has no application, because of the uncertain term of the office. . . ."

Therefore, it is the opinion of this office that such a city counselor, once appointed and qualified, holds office until he is removed under the provisions of Section 77.340, RSMo 1959, or otherwise and it is not necessary to resubmit his name to each newly elected city council.

Yours very truly,

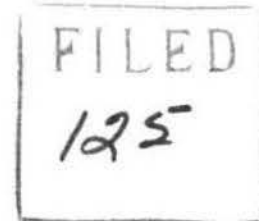
JOHN C. DANFORTH
Attorney General

March 10, 1970

LETTER OPINION NO. 125

Answered by B. J. Jones

Honorable F. L. Brenton
Representative - District 107
806 East Washington Boulevard
Cuba, Missouri 65453



Dear Mr. Brenton:

This is to acknowledge receipt of your request for an opinion from this office in regard to the constitutionality of a provision in House Bill 85 enacted at the regular session of the Seventy-Fifth General Assembly relating to the requirement that a chiropractor must pay to the State Board of Chiropractic Examiners an annual fee of ten dollars and furnish to the Board satisfactory evidence that he has attended a two day educational program as approved by the Board, in order to obtain a renewal of his license.

Subsection 2 of Section 331.050, as set forth in House Bill 85, of the Seventy-Fifth General Assembly, provides that all persons once licensed to practice chiropractic in this state shall pay on or before June 30 of each year, to the State Board of Chiropractic Examiners, an annual renewal license fee of ten dollars and shall furnish to the Board satisfactory evidence that he has attended a two day educational program as approved by the Board.

It is settled that the state under its police power has the right to regulate any business, occupation, trade or calling in order to protect the public health, morals, and welfare, subject to the restrictions of reasonable classification. 33 Am.Jur. Licenses, Section 17 (p. 336). In this connection, the legislature has power to require a license or certificate for the practice of medicine, surgery, dentistry, or other healing art. 70 C.J.S., Physicians and Surgeons, Section 6 (p. 826). Statutes have also been held valid which require practitioners of specified

Honorable F. L. Brenton -

branches of the healing arts to pay a fee for the annual renewal of their licenses; and to complete specified educational work during each year as a prerequisite or condition to the right to practice their profession or to have their licenses renewed, provided that such statutes either fix the standard of the educational work required or delegate to a Board the authority to set a required standard. 70 C.J.S., Physicians and Surgeons, Section 20, (p. 913).

In the case of State ex rel Week, et al. vs. Wisconsin State Board of Examiners, 20 N.W.2d 187, the Wisconsin Supreme Court held that a statute requiring chiropractors to annually attend one day of a two day educational program conducted by the Wisconsin Chiropractic Association in order to obtain renewal of their licenses was unconstitutional in that such delegation by the legislature did not fix any standard for the program to be offered nor did it delegate to the Board the authority to approve the standard to be offered. The court; however, stated at page 189:

"Respondents argue the legislature has the right to decide whether advancements in their profession require those engaged in its practice to attend educational programs in order to continue practicing. To this we agree. If the legislature had provided that any chiropractor desiring to have his annual license renewed must attend an educational program approved by the State Board of Examiners in Chiropractic we would have no difficulty with it, or if the legislature had adopted a standard which the program must meet it could well be argued this would be sufficient."

It should be noted that subsection 2 of Section 331.050 as set forth in House Bill 85 specifically provides that the two day educational program shall be approved by the State Board of Chiropractic Examiners. The Court in the Week case, supra, further stated that the fact that a person is once licensed does not create a vested property right in the licensee as advancements in the trade or profession may require additional conditions to be complied with if the general welfare of the public is to be protected.

For the above reasons, it is our view that subsection 2 of Section 331.050, as set forth in House Bill 85, requiring a chiropractor to pay to the State Board of Chiropractic Examiners an annual license fee of ten dollars and furnish to the Board satisfactory evidence that he has attended a two day educational program as approved by the Board, in order to obtain a renewal of his license, is not unconstitutional.

Very truly yours,

JOHN C. DANFORTH
Attorney General

SCHOOLS:
STATE AID:

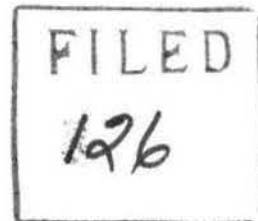
Where the assessment of property in
a school district is reduced by the
State Tax Commission to a point where

the district's levy is not sufficient to qualify it for the additional
state aid for tax effort provided in Section 163.031(1), V.A.M.S.
Senate Bill Nos. 1, 185 and 215, Seventy-fifth General Assembly, and
the district does not increase its tax rate before the year ends,
the district can do nothing thereafter to qualify for the additional
state aid for tax effort provided in Section 163.031(1).

OPINION NO. 126

July 21, 1970

Honorable Edward M. Cannon
State Representative
District No. 101
Rural Route No. 2
Troy, Missouri 63379



Dear Representative Cannon:

This official opinion is issued in response to your request for
a ruling on a question arising out of the following fact situation.
On February 10, 1969, the Louisiana R-II District Board of Educa-
tion approved a preliminary budget for the 1969-70 school year,
pursuant to Section 164.011, RSMo 1967 Supp. An estimated valua-
tion of property in the Louisiana R-II School District on \$13,200,000
was used by the Board of Education at their meeting on February 10,
1969, and a total levy of \$3.61 was arrived at.

On April 1, 1969, the annual school election for the Louisiana
R-II School District was held and the voters approved a levy of
\$1.86 in addition to the \$1.25 levy which can be levied without
voter approval. With a debt service levy of 50 cents set by the
Board of Education, a total levy of \$3.61 resulted.

By letter dated July 28, 1969, the Pike County Clerk notified
the Louisiana R-II School District that the county's assessed valua-
tion had been increased by ten percent or more over the prior year's
valuation. The new valuation for the Louisiana R-II District was
\$16,328,675. The letter requested that the district recertify and
submit a lower rate of levy pursuant to the requirements of Sec-
tion 137.073, RSMo 1959.

On August 18, 1969, the School Board of the Louisiana R-II
District, taking into consideration all the factors set forth in
Section 137.073, RSMo 1959, approved a new levy of \$3.06 which would
produce substantially the same revenue as would be produced by
\$3.61 on the lower valuation.

Honorable Edward M. Cannon

On December 16, 1969, the Board of Education of the Louisiana R-II District was informed by the county clerk that, due to action taken by the State Tax Commission in reducing the assessment of one taxpayer, the assessed valuation for the district had been reduced to \$14,358,265. In the information attached to your opinion request we are advised that a \$3.06 levy in 1969 was not sufficient to qualify for additional state aid for tax effort pursuant to Section 163.031(1), V.A.M.S., Senate Bill Nos. 1, 185 & 215, Seventy-fifth General Assembly.

In light of the foregoing facts, your question is whether the Louisiana R-II District can participate in the additional state aid for tax effort provided in Section 163.031(1).

Section 163.031(1) provides in part as follows:

" . . . A school district which levies a property tax that produces an amount not less than the product of a three dollars and fifty cents for each one hundred dollars tax on the property of the district assessed at thirty percent of true value as determined by the state tax commission on or before February first of the year preceding the fiscal year in which the evaluation will be effective or the average percent of true value for the highest three of the last four years as determined and certified by the state tax commission on or before February first preceding the fiscal year in which the evaluation will be effective, whichever is greater, shall be entitled to the sum of fourteen dollars per resident pupil in average daily attendance."

From the facts furnished by you which are set forth above, the Louisiana R-II District was forced by compliance with statutory directives to reduce its levy below the level which would have qualified it for the additional state aid provided in Section 163.031(1). When the county clerk advised the school district on July 28, 1969, that the assessed valuation of the district had been increased by more than ten percent, the district was required by Section 137.-073 to reduce the amount of the levy previously determined if it could be reduced without violating two provisos applicable to public schools.

"Whenever the assessed valuation of real or personal property within the county has been increased by ten per cent or more over the prior year's valuation, either by an order of

Honorable Edward M. Cannon

the state tax commission or by other action, and such increase is made after the rate of levy has been determined and levied by the county court, city council, school board, township board or other bodies legally authorized to make levies, and certified to the county clerk, then such taxing authorities shall immediately revise and lower the rates of levy to the extent necessary to produce from all taxable property substantially the same amount of taxes as previously estimated to be produced by the original levy. Where the taxing authority is a school district it shall only be required hereby to revise and lower the rates of levy to the extent necessary to produce from all taxable property substantially the same amount of taxes as previously estimated to be produced by the original levy, plus such additional amounts as may be necessary approximately to offset said district's reduction in the apportionment of state school moneys due to its increased valuation. The lower rate of levy shall then be recertified to the county clerk and extended upon the tax books for the current year. The term 'rate of levy' as used herein shall include not only those rates the taxing authorities shall be authorized to levy without a vote, but also those rates which have been or may be authorized by elections for additional or special purposes. No levy for public schools or libraries shall be reduced below a point that would entitle them to participate in state funds." [Emphasis added]

The language of Section 137.073 is mandatory -- ". . . such taxing authorities shall immediately revise and lower the rates of levy . . ." [Emphasis added]. Further, taxes levied by a taxing authority which are not in compliance with Section 137.073 are illegal. Allen v. Roam, 308 S.W.2d 787, 789 (Spr.Ct.App. 1958).

We can find no statutory provision making the duties of the Louisiana R-II District, under Section 137.073, subject to the right granted to any taxpayer under Section 138.420 to obtain a rehearing or, under Section 138.460, to file a complaint with the State Tax Commission prior to September 30, contesting an assessment made against his property. Therefore, the Louisiana R-II School District was required to comply with Section 137.073 even though any taxpayer whose assessment has been raised had a right to appeal this increase to the State Tax Commission.

Honorable Edward M. Cannon

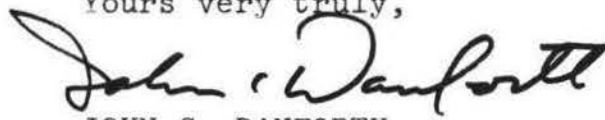
On August 18, 1969, the Louisiana School Board complied with its mandatory duty under Section 137.073 and reduced its tax rate to \$3.06. It is assumed that a \$3.06 tax rate would have been sufficient to qualify the district for additional state aid for tax effort had the district's assessed valuation remained at \$16,328,675. However, when the assessed valuation was lowered in December 1969, we are advised in the opinion request that \$3.06 is no longer sufficient to qualify the district for additional state aid for tax effort. No increase in the district's levy having been authorized in 1969, the district cannot now qualify for this additional state aid for the 1969-70 school year.

CONCLUSION

Therefore, it is the conclusion of this office that where the assessment of property in a school district is reduced by the State Tax Commission to a point where the district's levy is not sufficient to qualify it for the additional state aid for tax effort provided in Section 163.031(1), V.A.M.S., Senate Bill Nos. 1, 185 and 215, Seventy-fifth General Assembly, and the district does not increase its tax rate before the year ends, the district can do nothing thereafter to qualify for the additional state aid for tax effort provided in Section 163.031(1).

The foregoing opinion, which I hereby approve, was prepared by my Assistant, D. Brook Bartlett.

Yours very truly,



JOHN C. DANFORTH
Attorney General

May 7, 1970

OPINION LETTER NO. 129

Honorable George J. Pruneau
Prosecuting Attorney
Wayne County Courthouse
Greenville, Missouri 63944



Dear Mr. Pruneau:

This opinion is in response to your questions stated as follows:

- "1. May a circuit judge of a circuit composed of third and fourth class counties appoint as deputy circuit juvenile officer a full-time employee of the State Department of Revenue?
- "2. May such circuit judge appoint as a deputy circuit juvenile officer a person who is a township committeeman?

The appointment of juvenile court personnel is provided for in Section 211.351, RSMo 1959, as follows:

- "1. The juvenile court shall appoint a juvenile officer and other necessary juvenile court personnel to serve under the direction of the court in each county of the first and second class and the circuit judge in circuits comprised of third and fourth class counties.
- "(1) May appoint a juvenile officer and other necessary personnel to serve the judicial circuit; or

Honorable George J. Pruneau

"(2) Circuit judges of any two or more adjoining circuits may by agreement, confirmed by judicial order, appoint a juvenile officer and other necessary personnel to serve their respective judicial circuits and in such a case the juvenile officers and other persons appointed shall serve under the joint direction of the judges so agreeing.

"2. In the event a juvenile officer and other juvenile court personnel are appointed to serve as provided in subdivision (1) and (2) of subsection 1, the total cost to the counties for the compensation of these persons shall be prorated among the several counties and upon a ratio to be determined by a comparison of the respective populations of the counties."

The qualifications for juvenile officers are established by Section 211.361, RSMo 1959:

"1. Whenever the need arises for the appointment of a juvenile officer, the juvenile court shall either:

"(1) Provide, by rule of court, for open competitive written and oral examinations and create an eligible list of persons who possess the qualifications prescribed by subdivision (2) and who have successfully passed such examination; or

"(2) Appoint any person over the age of twenty-one years who has completed satisfactorily four years of college education with a major in sociology or related subjects or who, in lieu of such academic training, has had four years or more experience in social work with juveniles in probation or allied services.

"2. This section does not terminate the existing appointment nor present term of office of any juvenile officer or deputy juvenile officer in any county, but it applies to any appointment to be made after the existing appointment or term of office of any incumbent terminates or expires for any reason whatsoever.

In our view, any deputy circuit juvenile officer appointed by the circuit judge must possess the qualifications provided for by Section 211.361.

Honorable George J. Pruneau

The duties of juvenile officers, and inferentially of deputy juvenile officers, are enumerated in Section 211.401, RSMo 1959:

"1. The juvenile officer shall, under direction of the juvenile court:

"(1) Make such investigations and furnish the court with such information and assistance as the judge may require;

"(2) Keep a written record of such investigations and submit reports thereon to the judge;

"(3) Take charge of children before and after the hearing as may be directed by the court;

"(4) Perform such other duties and exercise such powers as the judge of the juvenile court may direct.

"2. The juvenile officer is vested with all the power and authority of sheriffs to make arrests and perform other duties incident to his office.

"3. The juvenile officers or other persons acting as such in the several counties of the state shall cooperate with each other in carrying out the purposes and provisions of Sections 211.011 to 211.431."

The Department of Revenue is within the executive branch of the state government; and the Director of Revenue has authority to hire, remove, and set the compensation of employees of the department. Section 32.050, RSMo Supp. 1967.

We find nothing incompatible between employment by the Department of Revenue and the office of deputy circuit juvenile officer. Of course, the appointee must be qualified to serve as deputy juvenile officer.

We understand your second inquiry to mean a township or ward committeeman of a political party within the meaning of Sections 120.770, RSMo, et seq. Again, we have examined the statutes and see no reason why such a committeeman cannot serve as a juvenile officer if he possesses the requisite qualifications.

Very truly yours,

JOHN C. DANFORTH
Attorney General

February 3, 1970

OPINION LETTER NO. 132

Honorable George W. Parker
Representative, District 120
819 Crestland
Columbia, Missouri 65201



Dear Representative Parker:

This opinion is in response to your questions stated as follows:

"1. Must a highway patrolman or police officer have reasonable grounds to suspect some law violation before he can stop a person on the road?

"2. Could you provide me with a copy of the guidance provided for the highway patrolmen on this subject?

"3. May one's car or person be searched on the road without a search warrant?"

In reviewing our opinion file, we note that you made a similar request for an opinion in 1967; and your request was answered by Opinion Letter No. 239, dated August 23, 1967.

In order to amplify upon our previous answer, please be advised that Section 43.200, RSMo 1959, states in full as follows:

"1. The members of the patrol shall not have the right or power of search nor shall they have the right or power of seizure except to take from any person under arrest or about to be arrested deadly or dangerous weapons in the possession of such person, and except that the members of the patrol shall have the power of search and seizure on a public highway of this state.

Honorable George W. Parker

"2. The superintendent of the patrol shall deposit with the governor a bond to the state of Missouri, duly executed by one or more corporate surety companies authorized to do business in this state, in the penal sum of fifty thousand dollars, conditioned upon the payment to persons injured of all damages arising out of any unlawful search, seizure or arrest made by any member of the patrol under the provisions of subsection 1. An action on the bond may be brought by the person injured in the county of plaintiff's residence or in the county in which the unlawful search, seizure or arrest occurred. The premium for the bond shall be paid by the state out of appropriations made for the support and operation of the highway patrol.

"3. The superintendent of the highway patrol shall see that every member of the highway patrol is thoroughly instructed in the powers of police officers to arrest for misdemeanors and felonies and to search and seize in order that no person or citizen traveling the highways shall be hindered, stopped, or arrested or his person or property searched or seized without constitutional grounds existing therefor."

We note that in D'Argento v. United States, 353 F.2d 327 (1965), the United States Court of Appeals for the Ninth Circuit held that a person could be stopped by an officer for the sole purpose of inquiring concerning whether such person possessed an operator's license and that such "stopping" was not unreasonable. This view is supported by other court decisions, and we consider it to be settled Missouri law. Further, this office held in Opinion No. 42, dated January 16, 1961, to Honssinger, copy enclosed, that a person operating a motor vehicle on a public highway commits a misdemeanor if he does not produce or display a motor vehicle operator's license upon demand by such officers.

With respect to the power of arrest, the United States Court of Appeals for the Eighth Circuit has held that a state highway patrol trooper who was following defendant's vehicle as it turned off the highway on to a private farmhouse road had the power and the authority to arrest the defendant without warrant provided he had probable cause to believe that the defendant was guilty of a felony. Jackson v. United States, 408 F.2d 1165 (1969). The test of such probable cause is whether the facts and circumstances known to the officer would warrant a prudent man in believing that such

Honorable George W. Parker

person had committed the offense. Jackson v. United States, i.d. Likewise with regard to arrest, this office held in Opinion No. 273, dated June 26, 1969, to Osborne, copy enclosed, that highway patrolmen are authorized to arrest without a warrant for a misdemeanor not committed in their presence, upon reasonable grounds, for violation of the laws relating to the operation of motor vehicles.

Of course, search of the individual's person has always been an incident to lawful arrest and this includes the immediate vicinity of the arrested party's person.

In answer to your question concerning the material the highway patrol uses for guidance, it is our understanding that the members of the patrol continuously participate in traffic institute courses offered by Northwestern University. The course material is not available for distribution from this office.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 273
6-26-69, Osborne

Op. No. 42
1-16-61, Honssinger

PROFESSIONAL CORPORATION:
CORPORATION:
PODIATRISTS:

The General Business and Corporation Law of Missouri, which permits corporations to be organized for any lawful purpose, does not authorize the organization of a corporation to engage in the practice of chiropody-podiatry where a statute regulating such practice contemplates only the licensing of individuals.

OPINION NO. 133

March 6, 1970

Frank Fulkerson, D.S.C., Secretary
Missouri State Board of Podiatry
920 Locust
Chillicothe, Missouri 64601



Dear Dr. Fulkerson:

This is in response to your request for an opinion on the question which was presented to you as follows:

"As you know, a good deal is being written and said these days about professional corporation. The Professional Corporation Law of Missouri allows members of your profession to incorporate. Have members of your profession incorporated yet; or do you have a prohibition against professional corporations even though they are permitted under the Professional Corporation Law of Missouri?

"If you do permit members of your profession to incorporate, is it material to you whether they incorporate under the Professional Corporation Law or under Chapter 351 of the Statutes of Missouri, The General Business and Corporation Act? If you do permit members of your profession to incorporate under the General Corporation Act, would you permit laymen to own any stock in the corporation, so long as only members of the profession perform the services of the corporation?"

As indicated in the above quoted opinion request, a corporation may be organized under the Professional Corporation Law for the purpose of rendering the type of professional service rendered by a licensed chiropodist-podiatrist, Section 356.020, RSMo Supp. 1967. A corporation organized under the Professional Corporation

Dr. Frank Fulkerson

Law may issue shares of its capital stock only to individuals who are licensed to practice the profession. The question presented in the opinion request is whether a corporation, having stockholders who are not licensed to practice the profession, may be organized to practice chiropody under the General Business and Corporation Law of Missouri.

Section 351.020, RSMo 1959, provides that a corporation may be organized under the General Business and Corporation Law of Missouri for any lawful purpose. The real question, therefore, is whether a corporation organized under this law to practice chiropody would be a corporation organized for a lawful purpose, that is, a purpose which is consistent with and in furtherance of the laws regulating the practice of chiropody.

The laws regulating the practice of chiropody are set forth in Chapter 330, RSMo. Section 330.020, RSMo 1959, provides that no one shall practice chiropody in Missouri unless duly licensed and registered as provided by law. Section 330.030, RSMo Supp. 1967, makes the issuance of a license dependent upon certain qualifications and provides in part as follows:

"Any person desiring to practice chiropody in this state, shall furnish the state board of chiropody with satisfactory proof that he or she is twenty-one years of age or over, and of good moral character, and a citizen of the United States, and that he or she has received at least four years of high school training, or the equivalent thereof, as determined by the board, and has received a diploma or certificate of graduation from an approved college of podiatry, recognized and approved by the state board of chiropody, having a minimum requirement of one year in an accredited college and four years in a recognized and reputable chiropody college. Upon payment of a fee of thirty-five dollars to the director of revenue, and making satisfactory proof as aforesaid, the applicant shall be examined by the state board of chiropody, or a committee thereof, under such rules and regulations as said board may determine, and if found qualified, shall be licensed to practice chiropody as registered, and shall receive in testimony thereof a certificate signed by the president and secretary of the board; . . ."

Dr. Frank Fulkerson

Statutes forbidding the practice of chiropody by unlicensed persons, making the passing of an examination a condition for issuance of a license, and requiring an applicant for examination to submit evidence that he or she has attained the age of twenty-one years, is of good moral character and has the necessary preliminary and professional education, manifest a legislative intent that licenses shall be issued only to human beings. Therefore, the General Business and Corporation Law of Missouri in authorizing the formation of corporations for any lawful purpose does not purport to include the purpose of rendering the type of professional service rendered by a licensed chiropodist.

Chiropody, in some respects, is comparable to the learned professions of law, medicine and dentistry in that a high degree of skill and integrity on the part of the practitioner is demanded. Efficiency in the diagnosis and treatment of ailments of the human foot must be combined with a relationship of trust and confidence between a chiropodist and the members of the public who consult him. It has been held that a corporation operated for profit may not practice chiropody through employees who are licensed chiropodists. In *Pilger v. City of Paris Dry Goods Co.* (California) 261 P. 328, the court stated l.c. 330:

" . . . The Legislature in authorizing the formation of corporations to carry on "any lawful business" did not intend to include the work of the learned professions. Such an innovation with the evil results that might follow would require the use of specific language clearly indicating the intention. . . ."

For the protection of the public health, the legislature has required that the practice of chiropody be conducted only by individuals possessing the qualifications, skill and knowledge specified in Chapter 330, RSMo. The legislature has authorized this result to be accomplished in either of two ways; one, by permitting the conducting of the practice to licensed individuals, and the other, by permitting the organization of a professional corporation for the purpose of rendering the type of service rendered by a licensed chiropodist. Neither of these ways permit the practice of chiropody under the General Business and Corporation Law of Missouri.

CONCLUSION

It is the opinion of this office that the General Business and Corporation Law of Missouri, which permits corporations to be organized for any lawful purpose, does not authorize the organization of a corporation to engage in the practice of chiropody-podiatry where a statute regulating such practice contemplates only the licensing of individuals.

Dr. Frank Fulkerson

The foregoing opinion, which I hereby approve, was prepared by my Assistant, L. J. Gardner.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being more prominent.

JOHN C. DANFORTH
Attorney General

January 22, 1970

OPINION LETTER NO. 134

Honorable L. Edward Stone, Jr.
State Senator
District No. 26
Chesterfield, Missouri 63017



Dear Senator Stone:

This letter is in response to your opinion request and also the opinion request of State Representative Fred W. Meyer in which you ask whether the Public Service Commission violates its Rule of Practice and Procedure No. 5.02(d) and Section 392.260, RSMo 1959, if it grants a public utility such as a telephone company a rate increase when said company has failed to obtain franchises in cities in which such utility operates.

Section 392.260, RSMo 1959, provides in full as follows:

"No telegraph corporation or telephone corporation hereafter formed shall begin construction of its telegraph line or telephone line without first having obtained the permission and approval of the commission and its certificate of public convenience and necessity, after a hearing had upon such notice as the commission may prescribe. Before any such certificate shall be issued there must be filed in the office of the commission by the applicant therefor a verified statement showing that the required consent of the proper municipal authorities has been obtained. The Commission may by its order impose such condition or conditions as it may deem reasonable and necessary. Unless exercised within a period of two years from the grant thereof authority conferred by such certificate of convenience and necessity issued by the commission shall be null and void."

Honorable L. Edward Stone, Jr.

Rule 5.02 of the Rules of the Public Service Commission provides in full as follows:

"Applications for a certificate of public convenience and necessity by a gas, electric, water, heating, telephone, railroad, or street railroad corporation shall comply with Rules 2.01 through 2.05 and 4.01. In addition, such applications shall contain the following:

- (a) Description of the area to be served.
- (b) The route of any construction involved, with a list of all utilities which such construction will cross or with which it is likely to compete.
- (c) The manner in which such construction is to be financed.
- (d) The granting of consent by franchise by city or county, when such is required, by including a certified copy of document containing such consent or franchise, or statutory affidavit of company officials that such consent has been acquired.
- (e) The facts showing that the granting of the application is required by the public convenience and necessity."

It is noteworthy that both Section 392.260 and Rule 5.02 apply to certificates of convenience and necessity and not to applications for rate changes.

Rule 6.01 applies to applications for authority to change rates and states:

"This rule applies to applications for authority to change any rate, fare or charge. Such applications shall comply with Rules 2.01 through 2.05 and 4.01. In addition, such applications shall contain the following data, either in the body of the application or in exhibits attached thereto.

- (a) Financial statement (see Rule 4.02), and pro forma statement giving effect to the proposed increase.

Honorable L. Edward Stone, Jr.

(b) A statement of the presently effective rates, fares, or charges which are proposed to be changed. Such statement need not be in tariff form.

(c) A statement of the proposed changes. Such statement need not be in tariff form, but shall set forth the proposed rate structure with reasonable clarity."

There is no requirement under Rule 6.01 that the Commission inquire into the question of whether the utility has such franchises. Further, there is no statute or rule of law which imposes such a duty on the Commission when application is made for rate changes.

The answer to your question is, therefore, that the Commission by granting the increases to such a company is not in violation of either its Rules or the statutes.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Answer by letter-Wood

April 2, 1970

OPINION LETTER NO. 135

Honorable Noel Cox
State Senator
District No. 29
Ozark, Missouri 65721



Dear Senator Cox:

You have asked for my opinion as to whether the City of Nixa, a fourth class city, may condemn an easement for a sewer line across a special road district.

The Missouri Water Pollution Board has recently approved the plans for the construction of this sewer line from its initial junction point outside the Nixa city limits to the treatment plant, approximately one mile southeast of the city limits. These plans call for the sewer line to crisscross under a public gravel road for approximately 3,000 linear feet at a depth ranging from 4.37 feet to 6.88 feet below the surface of the ground. Eleven manhole covers would lie within the roadway. We presume that this road is the special road district property in question.

Real property within a special road district that is privately owned would be subject to condemnation by a city for sewer purposes.

"The governing body of the municipality [third and fourth class cities, special charter cities, and towns and villages] shall have power to condemn private property for use, occupation or possession in the construction and repair of sewers, in the same manner as other property is condemned for public uses." Section 88.844, RSMo 1959 (emphasis added)

Honorable Noel Cox

It is immaterial whether the privately owned property is within or without the corporate limits of the condemning municipal authority (Sections 88.077, RSMo, 250.010 (1), RSMo).

Special road districts are public corporations (Sections 233.025, 233.170, 233.320, RSMo 1959) which have "sole, exclusive and entire control and jurisdiction over all public highways" within their districts (Section 233.070 (1), 233.190 (2), 233.340 (3), RSMo 1959), except city streets (see enclosed opinion).

Public roads are easements or rights of ways crossing privately owned lands.

"It is error to suppose that the land over which a public road passes belongs to the state or county. The law, for the convenience of the community, has appropriated portions of the lands of individuals to be used as public roads or highways. Subject to this use or easement of the public, the soil over which the road passes remains in the owner, in the same manner as though no appropriation of it had been made. When the land of an individual is taken for a road, whether he gives it voluntarily or sells a right of way over it by claiming and receiving compensation, he must be understood as giving to the public power over it, to an extent that will enable it to construct such a road as the laws in force at the time require or permit to be made. . . ." (Williams v. Natural Bridge Plank Road Co., 21 Mo. 580, 582 (1855))

". . . Under a common-law dedication, the public acquired a mere easement. By such dedication the public had the use of the surface for a highway and so much below the surface as was necessary for a complete enjoyment of the easement. The fee to the highway (in the full sense of the term fee) was not vested in the public. . . ." (Neil v. Independent Realty Co., 298 S.W. 363, 366 (Mo. 1927))

". . . the limited quantum of interest which a municipality takes in streets and alleys within its corporate limits which are dedicated to public use. Such interest is not a title in fee simple, but only an easement which

Honorable Noel Cox

consists of the right of the public to make use of the streets and alleys for the purpose intended by the dedication, and for no other use or purpose. Meanwhile, the fee (subject to the easement) remains in those who owned the land at the time of its dedication to public use, and in their successors in title; and if ever the streets and alleys are vacated and their public use abandoned, the original owners, or their grantees, will thereafter hold the same freed from the burden of the former public use. In other words, when there is a termination of the public use for which the dedication was made, there is a reverter of such use to the owners of the servient estate, who at all times held title subject to the right of public use. . . ." (Roy F. Stamm Elect. Co. v. Hamilton-Brown Shoe Co., 171 S.W.2d 580, 582-583 (Mo. en banc 1943))

Consequently, it is our opinion that a fourth class city may condemn a sewer line easement under a special road district road. Condemnation in this situation would be a taking of "private property" and thus within the terms of the statute empowering such cities to condemn for sewer purposes.

However, the surface of the roadway is public property, and its taking by the City of Nixa, whether for initial construction of the sewer line, or for maintenance of the sewer line through the manholes, is not in terms authorized by the statute (Section 88.844, RSMo 1959).*

In State ex rel State Highway Commission v. Hoester, 362 S.W.2d 519 (Mo. en banc 1962), the Supreme Court upheld the right of the Highway Commission to condemn property already devoted to a public use, that of a fire protection district organized under Chapter 321, RSMo, and thereby destroy the fire district's use of the property. The court emphasized that the particular condemning authority was the sovereign state, and suggested that the result would have been otherwise had the condemning authority been a municipality.

*Contrast the statute authorizing sewer districts in counties having a population of 700,000 to 750,000 ". . . to construct any and all said works and improvements across, through or over any public highway, . . . [and] to condemn any and all rights or property, either public or private, of every kind and character necessary. . ." (Section 249.290, RSMo 1959).

Honorable Noel Cox

" . . . In the Moore case [190 S.W. 867], we held 'the power of a city to condemn property for street purposes is limited to private property, and does not extend to property of the state or property held by a subordinate agency of the state, for the state, as distinguished from other corporations.' . . .

"However, as stated in 1 Nichols on Eminent Domain, 3rd Ed., 131, Sec. 2.2: 'In the determination of the question whether or not property already devoted to a public use can be subjected to the process of eminent domain the primary factor to be considered is the character of the condemnor. If the sovereign, such as the state or the United States on its own behalf and for its own sovereign purposes, seeks to acquire such property by eminent domain, the character of the "res" as public property, generally, has no inhibiting influence upon the exercise of the power.' Likewise, it is said in 29 C.J.S. Eminent Domain 861-862, § 74 p. 861-862: 'As a general rule, property already devoted to a public use cannot be taken for another public use which will totally destroy or materially impair or interfere with the former use, unless the intention of the legislature that it should be so taken has been manifested in express terms or by necessary implication, mere general authority to exercise the power of eminent domain being in such case insufficient; * * *. However, the general rule does not ordinarily apply where the power of eminent domain is being exercised by the sovereign itself, such as the state or federal government, for its immediate purposes, rather than by a public service corporation or a municipality.'" (State ex rel State Highway Commission v. Hoester, 362 S.W.2d at 521-522) (Emphasis added)

We do not pass on the question whether a city with statutory authority to condemn only private property could condemn an easement in public property if it occasioned no material impairment or interference with the public use of the property because it is our opinion that the planned use of the public road for the sewer line construction and subsequent maintenance would constitute a material

Honorable Noel Cox

interference with the existing public use, and that absent a statute expressly authorizing cities of the fourth class to so condemn, it cannot be done.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure: Opinion to Russell S. Noblet
12-29-41

SHERIFFS:

COMPENSATION AND FEES:

No. 165, 75th General Assembly), which require that the sheriffs of third and fourth class counties pay fees collected by them in civil matters into the county treasury, except the charges for each mile travelled, that such sheriffs are not to collect charges for services where such charges are payable out of the county treasury.

With respect to Paragraph 3 of Section 57.407 and Paragraph 3 of Section 57.409, V.A.M.S. (Senate Bill

OPINION NO. 136

February 3, 1970

Honorable Haskell Holman
State Auditor
Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Holman:

This opinion is in response to your question concerning whether or not sheriffs of third and fourth class counties are presently entitled to charge and collect from such counties those fees in connection with civil matters which are payable by the counties and which, if collected, must be paid back to the county treasury.

You make specific reference to the provisions of Section 57.280, RSMo 1959, which provides that such sheriffs are allowed for their services:

"For summoning a standing jury. . . . \$8.40

"For attending each court of record
or criminal court and for each deputy
actually employed in attendance upon
such court the number of such deputies
not to exceed three per day 3.00

Your question is not limited to the items enumerated, and the question involved and decided here pertains to all such items payable out of the county treasury to the sheriff.

The recent provisions contained in Paragraph 3 of Section 57.407 and Paragraph 3 of Section 57.409, V.A.M.S. (Senate Bill No. 165) provide that in counties of the third and fourth classes

Honorable Haskell Holman

after October 13, 1969, "the sheriff shall pay all fees collected by him in civil matters and which were previously retainable by him into the county treasury, except charges for each mile travelled, allowable to him, which he may retain, in serving civil process".

Insofar as criminal fees are concerned, the legislature with respect to third and fourth class counties has specifically provided that the sheriff is not to collect such criminal fees as are chargeable to the county. Section 57.410, V.A.M.S.

The above fees, however, are civil and were provided as compensation for the sheriff out of the treasury of the county under Section 476.270, RSMo 1959. Although the fee for the attendance at court includes attendance at criminal courts, we have previously concluded that such fee was for services rendered by the sheriff, not in any criminal case but in the performance of the general duties of his office.

While it is difficult to define "standing jury", we have previously interpreted the words to mean a petit jury panel.

Since these charges have been payable out of the county treasury for general services rendered by the sheriff and are not included in a cost bill, it follows that if such charges are made by such sheriff then under the provisions of Section 57.407 and 57.409, V.A.M.S., the amounts so collected would have to be paid into the county treasury.

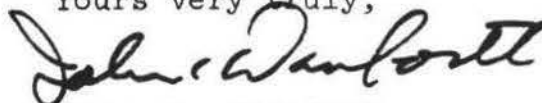
We are sure that the legislature did not intend to reach an absurd result. Since the collection of such fees serve no purpose, we are of the opinion that the legislature did not intend these sheriffs to collect such fees payable by the county. The sheriffs, of course, are still required to perform such duties.

CONCLUSION

It is the opinion of this office with respect to Paragraph 3 of Section 57.407 and Paragraph 3 of Section 57.409, V.A.M.S. (Senate Bill No. 165, 75th General Assembly), which require that the sheriffs of third and fourth class counties pay fees collected by them in civil matters into the county treasury, except the charges for each mile travelled, that such sheriffs are not to collect charges for services where such charges are payable out of the county treasury.

The foregoing opinion, which I hereby approve, was prepared by my assistant John C. Klaffenbach.

Yours very truly,



JOHN C. DANFORTH
Attorney General

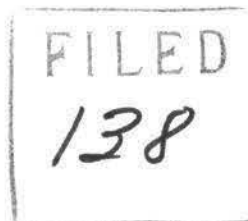
TAXATION (SALES AND USE):
MOTOR VEHICLES:

The trade-in allowance in Section 144.025, RSMo Supp. 1967, does not apply to any article, including an automobile, on which a sales or use tax has not been paid to Missouri. Therefore, sales tax is due on the full purchase price of a new automobile purchased in Missouri when an automobile registered, purchased and driven for 90 days in good faith in another state is used as a trade-in.

March 18, 1970

OPINION NO. 138

Honorable A. Basey Vanlandingham
Senator - 19th District
12 Glennview Plaza
P. O. Box 711
Columbia, Missouri 65201



Dear Senator Vanlandingham:

This is in answer to your request for an official opinion of this office concerning the question whether sales tax is due on the full purchase price of a new automobile purchased in Missouri when an automobile registered, purchased and driven for 90 days in good faith in another state is used as a trade-in.

Section 144.440, RSMo Supp. 1967, imposes a use tax for the privilege of using the highways of Missouri and reads in part as follows:

"1. In addition to all other taxes now or hereafter levied and imposed upon every person for the privilege of using the highways of this state, there is hereby levied and imposed a tax equivalent to three per cent of the purchase price, as defined in section 144.070, which is paid or charged on new and used motor vehicles and trailers purchased or acquired for use on the highways of this state which are required to be registered under the laws of the state of Missouri."

It is clear that if an automobile had been purchased, registered and regularly operated in good faith in another state for 90 days, said automobile could be registered in Missouri without payment of the Missouri use tax. Section 144.450, RSMo Supp. 1967.

Honorable A. Basey Vanlandingham

However, there remains the question of whether trade-in allowance for tax purposes is allowed on the outstate automobile.

Section 144.070.2, RSMo Supp. 1967, defines purchase price as follows:

"As used above, the term 'purchase price' shall mean the total amount of the contract price agreed upon between the seller and the applicant in the acquisition of said motor vehicle or trailer, regardless of the medium of payment therefor."

It appears from reading this section that no trade-in is allowed and tax must be paid on the list price of any automobile.

However, Section 144.025, RSMo Supp. 1967, specifically allows a trade-in as follows:

"Other provisions of law notwithstanding, in any retail sale where any article on which a sales or use tax has been paid to this state is taken in trade as a credit or part payment on the purchase price of the article being sold and the difference between the trade-in allowance and the purchase price exceeds five hundred dollars, the tax imposed by sections 144.020 and 144.440 shall be computed only on that portion of the purchase price in excess of the actual allowance made for the article traded in or exchanged."
(Emphasis added).

The question, then, is whether this trade-in is allowed for an article where a sales or use tax has not been paid to Missouri, whether paid to another state or not.

Section 144.025 is in the nature of an exemption section and thus should be construed strictly against one seeking the exemption. *Hern v. Carpenter, Mo.*, 312 S.W.2d 823.

The clear language of Section 144.025, RSMo Supp. 1967, is that the trade-in allowance can only be given on articles on which a sales or use tax has been paid to Missouri. The fact that a sales or use tax has been paid to another state does not change the meaning of the statute.

CONCLUSION

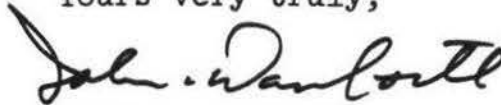
It is the opinion of this office that the trade-in allowance in Section 144.025, RSMo Supp. 1967, does not apply to any article, including an automobile, on which a sales or use tax has not been paid

Honorable A. Basey Vanlandingham

to Missouri. Therefore sales tax is due on the full purchase price of a new automobile purchased in Missouri when an automobile registered, purchased and driven for 90 days in good faith in another state is used as a trade-in.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Walter W. Nowotny, Jr.

Yours very truly,

A handwritten signature in cursive script, appearing to read "John C. Danforth".

JOHN C. DANFORTH
Attorney General

Answer by Letter (Blackmar A.)

January 28, 1970

OPINION LETTER NO. 140

Honorable James C. Kirkpatrick
Secretary of State
State of Missouri
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Kirkpatrick:

Pursuant to Section 126.060, RSMo 1959, I have prepared a ballot title for the referendum on Senate Bill No. 1, First Extra Session, Seventy-Fifth General Assembly. The ballot title is:

"Provides for a new Missouri income tax law to replace the existing Missouri income tax law. The new law revises tax rates and adopts many terms and concepts found in the federal income tax law."

Very truly yours,

JOHN C. DANFORTH
Attorney General

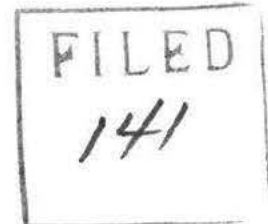
JUVENILE OFFICERS:
PROSECUTING ATTORNEYS:
SHERIFFS:

Prosecuting attorneys and sheriffs
or other law enforcement officers
occupy positions that are incom-
patible with and in conflict with
the position of the juvenile officer under the Juvenile Act, and
therefore, such officers may not serve as juvenile officers or
deputy juvenile officers.

OPINION NO. 141

May 7, 1970

Honorable Alden S. Lance
Prosecuting Attorney
415 West Main Street
Savannah, Missouri 64485



Dear Mr. Lance:

This opinion is in response to your request in which you ask whether or not a sheriff of a third class county which is a part of the judicial circuit containing a second class county may serve as deputy juvenile officer for that county when the juvenile officer is from the second class county which is a part of the same judicial circuit.

You have furnished us with other information concerning the situation. However, for reasons which will become apparent, we will not go into further detail in this opinion.

That is to say, in our Opinion No. 12, 2/3/58, to O.O. Brown, we held that a prosecuting attorney of a third class county could be appointed as the juvenile officer. Likewise, in Opinion No. 20, 10/29/57, to Curtis, this office held that a sheriff can be appointed as a juvenile officer. In view of the recent court decisions, we are now of the opinion that the conclusions reached in these two cited opinions are now incorrect and they are hereby withdrawn.

On January 12, 1970, the Supreme Court of Missouri in State of Missouri vs. Joseph Franz Arbeiter, 449 SW 2d. 627, stated quite clearly the position of the juvenile officer and the juvenile courts with relation to the juvenile; and in our view, the opinion of the court requires that we now conclude that the position of prosecuting attorney and the position of a law enforcement officer such as the sheriff is in conflict with and incompatible with the position of juvenile officer.

Honorable Alden S. Lance

For example, Commissioner Welborn in the Arbeiter case noted that:

"Considerations of 'fundamental fairness' . . . do not permit the state, in the harsh adversary arena of the criminal courts, to take advantage of the procedures and attitudes which it promoted under the Juvenile Code."

This conclusion emphasized that such practices would be tantamount to a breach of faith with the child, would destroy the juvenile court *parens patriae* relation to the child, and would violate the non-criminal philosophy which underlies the juvenile act.

In quoting from Harling v. United States, 295 F.2d 161, decided in 1961 by the United States Court of Appeals for the District of Columbia, the court stated:

"In United States v. Dickerson, 1959, 106 U.S. App. 221, 225, 271 F.2d 487, 491, we strongly intimated that any 'departure in practice from that philosophy would require the application of procedural safeguards observed in criminal proceedings.' These safeguards, however, are wholly inappropriate for the flexible and informal procedures of the juvenile court which are essential to its *parens patriae* function. To avoid impairment of this function, juvenile proceeding must be insulated from the adult proceeding. This requires that admissions by a juvenile in connection with the non-criminal proceedings be excluded from evidence in the criminal proceedings."

The court in Arbeiter, also quoting from State v. Maloney, 102 Ariz. 495, 433 P.2d 625, referred to the value of the procedures employed by the juvenile court and the manner in which the court gathers evidence. For example, it was stated that one of the most valuable tools of the juvenile court is the prehearing report which usually includes a summary situation, a history of the family and the child, and a recommendation of disposition, and often includes confidential information from people who know the child.

The conclusion followed that one of the underlying policies of the Juvenile Code was to separate the juvenile process from the criminal procedure.

Further, quoting from State v. Gullings, 244 Ore. 173, 416 P.2d 311, the Supreme Court in Arbeiter continued stating:

Honorable Alden S. Lance

"The parens patriae theory of juvenile treatment. . . is necessarily based upon a close relationship between the child and the representatives of the court. The desired result is the child's trust and confidence in the representatives of the court and the full disclosure by the child to them. Until such a condition exists, the chances for successful and meaningful treatment on a parens patriae basis are minimal. The essence of such treatment is the establishment of a nonformal adversary atmosphere which is the antithesis of adult criminal procedure. . . If information secured by juvenile authorities is indiscriminately used as a basis for imposing criminal responsibility, juvenile courts cannot legitimately complain if traditional criminal constitutional standards are required of them in all their proceedings. Such a result would naturally be self-defeating if there is little room for the parens patriae relationship to operate within the narrow confines of standards evolved for use in the adversary criminal setting."

It is clear from the opinion in Arbeiter that the parens patriae relationship does not exist between police and the child, but between the court and the child, and that there is a clear distinction between the function of the police and the prosecuting attorneys who are responsible for solving and prosecuting transgressions against society and the function of the juvenile officers who are responsible for the rehabilitation of the child and the treatment of his emotional and family problems where the free exchange of information and the close relationship is important.

In reaching these conclusions, we are also persuaded by the dissenting opinion of Judge Seiler in State v. Reagan, 427 S.W.2d 371 (1968), in which he stated at l.c. 380:

"Anyone who has any experience with children knows how important it is to corrective action to get after the truth and to have the confidence and the respect of the child. Henceforth, however, any advisor of a juvenile who knows of this decision --- lawyer, minister, relative, teacher, friend, or whoever it may be --- will advise a juvenile that no matter what assurances he receives from the juvenile authorities he cannot safely tell them the truth if that involves him in a criminal act,

Honorable Alden S. Lance

because it may well turn out that what he tells them will wind up in the hands of the prosecuting authorities 'for the purposes of inspection, copy and the use in preparation of trial' against him. This decision delivers a further blow to the rehabilitative aspect of juvenile court work. It will keep juveniles from speaking freely."

In addition, we note that Section 211.271 of the Juvenile Code was amended by House Bill No. 375 of the 75th General Assembly, in particular Paragraph 3 thereof, to read as follows:

"3. After a child is taken into custody as provided in Section 211.131, all admissions, confessions, and statements by the child to the juvenile officer and juvenile court personnel and all evidence given in cases under the chapter, as well as all reports and records of the juvenile court are not lawful or proper evidence against the child and shall not be used for any purpose whatsoever in any proceedings, civil or criminal, other than proceedings under this chapter."

As a result, as we stated above, we necessarily conclude that the position of prosecuting attorney, sheriff or law enforcement officer is such that it is under these decisions obviously incompatible and in conflict with the function and position of the juvenile officer in this state.

CONCLUSION

It is, therefore, the opinion of this office that prosecuting attorneys, sheriffs or other law enforcement officers occupy positions that are incompatible with and in conflict with the position of the juvenile officer under the Juvenile Act, and therefore such officers may not serve as juvenile officers or deputy juvenile officers.

The foregoing opinion, which I hereby approve, was prepared by my assistant John C. Klaffenbach.

Yours very truly,



JOHN C. DANFORTH
Attorney General

March 18, 1970

OPINION LETTER NO. 142

Honorable James L. Paul
Prosecuting Attorney
McDonald County Court House
Pineville, Missouri 64856



Dear Mr. Paul:

This letter is in response to your request for a ruling in which you inquired whether a small, incorporated, non-profit country club and golf course, partially financed by FHA funds, is the proper subject for property tax assessment.

There are certain well established rules which must guide any determination of whether certain property is exempt from taxation. Generally, all property is liable to taxation unless specifically exempted. Taxation is the rule, exemption is the exception; and claims for exemption are not favored in the law. Bethesda General Hospital v. State Tax Commission, 396 S.W.2d 631 (Mo. 1965); Midwest Bible & Missionary Institute v. Sestric, 260 S.W.2d 25 (Mo. 1953). Exemption statutes must be strictly construed against the taxpayer and the burden is on the party claiming the exemption to establish clearly his right thereto. In re First Nat. Safe Deposit Co., 173 S.W.2d 493 (Mo. En Banc 1943); State ex rel St. Louis Young Men's Christian Ass'n v. Gehner, 11 S.W.2d 30 (Mo. En Banc 1928). However such statutes also should be reasonably construed so as not to curtail the intended scope of the exemption. Frisco Employees' Hospital Ass'n. v. State Tax Commission, 381 S.W.2d 772; St. Louis Gospel Center v. Prose, 280 S.W.2d 927 (Mo. 1955).

Constitutional exemption from taxation of certain property is granted by Article X, Section 6 and Article III, Section 43 of the Missouri Constitution.

Article X, Section 6 provides:

All property, real and personal, of the state, counties and other political subdivisions, and non-profit cemeteries, shall be exempt from taxation; and all property, real and personal, not held for private or corporate profit and used exclusively for religious worship, for schools and colleges, for purposes purely charitable, or for agricultural and horticultural societies may be exempted from taxation by general law. All laws exempting from taxation property other than the property enumerated in this article, shall be void.
(Emphasis added)

Article III, Section 43 provides in part:

. . . No tax shall be imposed on land the property of the United States; . . .

Implementing the constitutional provisions of Section 6, Article X, is Section 137.100, RSMo, which provides:

The following subjects are exempt from taxation for state, county or local purposes:

- (1) Lands and other property belonging to this state;
- (2) Lands and other property belonging to any city, county or other political subdivision in this state, including market houses, town halls and other public structures, with their furniture and equipments and on public squares and lots kept open for health, use or ornament;
- (3) Nonprofit cemeteries;
- (4) The real estate and tangible personal property which is used exclusively for agricultural or horticultural societies organized in this state;
- (5) All property, real and personal actually and regularly used exclusively for religious worship, for schools and colleges, or for purposes purely charitable and not held for private or corporate profit, except that the exemption herein granted does not include real property not actually used or occupied for the purpose of the organization but held or used as investment even though the income or rentals received therefrom is used wholly for religious, educational or charitable purposes.

Honorable James L. Paul
Page 3

With these principles in mind, we must conclude that the real estate referred to in your inquiry cannot be exempt unless found to be owned by the state or federal government or a political subdivision or, if privately or corporately owned, found to be used exclusively for religious, educational or charitable purposes and not held for private or corporate profit. The situation you pose, therefore, precludes exemption status. The mere fact that an incorporated country club finances the purchase of real estate with federal funds does not remove the ownership of property purchased from the country club. The property is not owned by the federal government in any sense. Likewise, although the situation posed presupposes that the country club is non-profit, the further requirement for exemption that it be used exclusively for religious, educational, or charitable purposes is not present. Property used as a country club and golf course by members most certainly cannot be said to be used, in any sense, for those purposes which exempt property from taxation.

Therefore, we must conclude that real estate purchased by a non-profit corporation for the purpose of building a country club and golf course for use by members such purchase being financed by federal FHA funds, is subject to property tax assessment.

Yours very truly,

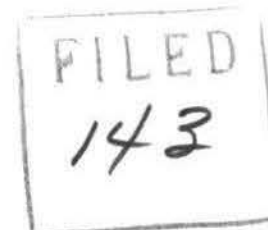
JOHN C. DANFORTH
Attorney General

MOTOR VEHICLES: When the Director of Revenue receives notice of
LICENSES: forfeiture of collateral under Section 302.302,
 RSMo Supp. 1967, he must assess the appropriate
points. If notice is received that the forfeiture has been set aside
or vacated, the assessment of points based on that forfeiture of col-
lateral is a nullity and all records should be adjusted accordingly.
If after setting aside the forfeiture of collateral there is a con-
viction of the offense, the Director must, upon receipt of notice of
such conviction, assess points and take whatever additional action
that is called for by the assessment of such points.

April 1, 1970

OPINION NO. 143

Honorable James E. Schaffner
Director
Department of Revenue
Jefferson Building
Jefferson City, Missouri 65101



Dear Mr. Schaffner:

This is in reply to your request for an official opinion of this office concerning the dates used in determining the number of points accumulated for traffic violations and asking whether the points are to be awarded when there is a forfeiture of bail, or when a conviction follows when the forfeiture of bail is set aside and the person appears in court for trial.

Section 302.302, RSMo Supp. 1967, establishes a point system for purposes of suspension or revocation of a motor vehicle operator's license and reads in part as follows:

"1. The director of revenue shall put into effect a point system for the suspension and revocation of chauffeurs' and operator's licenses. Points shall be assessed only after a conviction or forfeiture of collateral. * * * "

Your question is what procedure to follow when notice is received of a forfeiture of collateral and then some months or years later notice is received that the forfeiture of collateral is set aside and a conviction has been entered for the same offense. The Department of Revenue has been assessing points on notice of forfeiture of collateral

Honorable James E. Schaffner

but has not been able to determine what it can do with the subsequent notice of conviction and setting aside of the forfeiture of collateral.

Section 302.304, RSMo Supp. 1967, provides for the suspension or revocation of a license depending on the accumulation of a certain number of points in a certain period of time. The procedure to be followed in the instant situation naturally would affect the application of Section 302.304.

The procedure to be followed also would affect the return of a license under Section 302.309, RSMo Supp. 1967, and the reduction of points under Section 302.306, RSMo Supp. 1967.

It is clear that under Section 302.302, the Director of Revenue must assess the appropriate points upon notice of forfeiture of collateral. See Pryor v. David, Mo., 436 S.W.2d 3.

Under the drivers' license law, Chapter 302, RSMo, forfeiture of collateral is the same as a conviction. Section 302.010(4), RSMo Supp. 1967; Pryor v. David, supra, l.c.5. Section 302.010(4) reads in part as follows:

"(4) 'Conviction', any final conviction; also a forfeiture of bail or collateral deposited to secure a defendant's appearance in court, which forfeiture has not been vacated, shall be equivalent to a conviction, * * *" (Emphasis added).

Forfeiture of collateral and the setting aside of the forfeiture for violation of state misdemeanor provisions involving motor vehicles is provided for in Supreme Court Rule 37.485 which reads in part as follows:

" * * *

"(b) If the person recognized does not appear before the magistrate according to the condition of the recognizance the magistrate shall record the default, but the default may be set aside by the magistrate on the appearance of the person recognized and for good cause shown, at any time to which the examination may be continued by the magistrate. * * *

Therefore, it is our opinion that when the Director receives notice that forfeiture has been set aside or vacated, the assessment of points based on that forfeiture of collateral is a nullity and all records should be adjusted accordingly.

Of course, the license may have already suffered a suspension or revocation but the Department of Revenue has no power to alter that fact. It should be noted that the licensee brought the situation upon

Honorable James E. Schaffner

himself by forfeiting collateral.

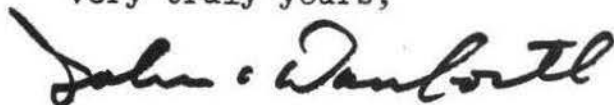
If after setting aside of forfeiture of collateral there is a conviction of the offense, it is our opinion that the Director must, upon receipt of notice of such conviction, assess points and take whatever additional action that is called for by the assessment of such points.

CONCLUSION

It is the opinion of this office that when the Director of Revenue receives notice of forfeiture of collateral under Section 302.302, RSMo Supp. 1967, he must assess the appropriate points. If notice is received that the forfeiture has been set aside or vacated, the assessment of points based on that forfeiture of collateral is a nullity and all records should be adjusted accordingly. If after setting aside the forfeiture of collateral there is a conviction of the offense, the Director must, upon receipt of notice of such conviction, assess points and take whatever additional action that is called for by the assessment of such points.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Walter W. Nowotny, Jr.

Very truly yours,



JOHN C. DANFORTH
Attorney General

March 6, 1970

LETTER OPINION NO. 144

Honorable Leon M. Jordan
Representative - District 11
2548 Prospect Avenue
Kansas City, Missouri 64108



Dear Representative Jordan:

This letter answers your inquiry asking what conduct and actions are lawful for a "Social, Benevolent or Fraternal" Association of police and you refer to lobbying; discussing working conditions with the employer and forming committees to improve their lot.

The pertinent statute is Section 105.510, Senate Bill No. 36, 75th General Assembly and reads as follows:

"Employees, except police, deputy sheriffs, Missouri state highway patrolmen, Missouri national guard, all teachers of all Missouri schools, colleges and universities, of any public body shall have the right to form and join labor organizations and to present proposals to any public body relative to salaries and other conditions of employment through the representative of their own choosing. No such employee shall be discharged or discriminated against because of his exercise of such right, nor shall any person or group of persons, directly or indirectly, by intimidation or coercion, compel or attempt to compel any such employee to join or refrain from joining a labor organization, except that the above excepted employees have the right to

Honorable Leon M. Jordan

form benevolent, social, or fraternal associations. Membership in such associations may not be restricted on the basis of race, creed, color, religion or ancestry."

We note that the statute as amended remained the same in substance except that portion (which we have underscored) was added by the recent amendment.

We think it is plain that the excepted employees (among other things) are given the right to form and belong to a benevolent, social or fraternal association. A similar question on representation by an association of employees vis-a-vis the employer was submitted on the original statute involving national guard which is also an excepted class like the police. There were no changes in that portion of the statute (Section 105.510, V.A.M.S.) on an "associations" power to represent a member of an excepted class and/or bargain for them. This exception has been held constitutional. See State ex rel. Missey v. City of Cabool, (Mo.) 441 S.W.2d 35, 43. Our Opinion No. 285, dated December 10, 1968, addressed to Major General Adams, Jr., on the national guard is attached. We held there that an association could not bargain for the national guardsmen. It is our view that the force and effect of our opinion (supra) is not changed by the amendment. We conclude, therefore, that a social, benevolent, or fraternal association of police has no authority to enter into any written proposals with the representative of the city which must be presented to the city for action under Section 105.520, V.A.M.S.

You asked if the association could lobby. We see no objections providing they comply with the pertinent laws on lobbying such as registration of its agent, etc. In this case, we equate the term, to "lobby," to be the equivalent of the right of petition and presenting their views to a public officer or legislative body as provided in Missouri Constitution of 1945, Article I., Sections 8, 9, 29, and United States Constitution, Amendment I. The Missouri Supreme Court in City of Springfield v. Clouse, (Mo.) 206 S.W.2d 539, 542, dealt extensively with this right and approved this action.

On the subject of "forming committees to improve our common lot," we view this as being akin to the constitutional right of petition that this state has always recognized as a constitutional prerogative of its citizens. The Missouri Supreme Court recognized this in City of Springfield v. Clouse, (Mo.) 206 S.W.2d 539, 542, where the subject is fully discussed. Thus, we see no objections to the forming of committees to improve the common lot of

Honorable Leon M. Jordan

the police subject to the limitation that such committees may not present proposals to the employer "relative to salaries and other conditions of employment of the employees," i.e., the police, which proposals must be acted on as provided in Section 105.520, V.A.M.S.

We trust this responds to your inquiry and if you have further problems in this area, please feel free to submit them to me.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure:

Op.No. 285, Major General Adams, Jr., 12-10-68

CIRCUIT CLERKS:

The Clerk of the Circuit Court of the City of St. Louis does not have discretionary authority to invest funds deposited in the registry of the court in United States Treasury Notes under Section 483.310, RSMo 1959.

OPINION NO. 145

March 20, 1970

Honorable Richard J. Rabbitt
Representative - District 68
4340 Forest Park
St. Louis, Missouri 63108



Dear Mr. Rabbitt:

This official opinion is issued in response to the request contained in your letter forwarding a letter from Mr. Joseph P. Roddy, Clerk of the Circuit Court of the City of St. Louis.

The question concerns the legal right of the Circuit Clerk of the City of St. Louis to invest funds in his care in United States Treasury Notes under Section 483.310, RSMo 1959. Section 483.310, RSMo, in pertinent part provides as follows:

"The circuit clerks in counties of the first class are hereby authorized and empowered to invest funds placed in the registry of the circuit court in savings deposits in banks carrying federal deposit insurance to the extent of the insurance * * * "

A prior opinion of this office expressed the view that the City of St. Louis is a county of the first class insofar as concerns the application of this statute relating to investment of funds. Attorney General Opinion No. 451, dated November 13, 1969, issued to the Honorable Richard J. Rabbitt.

Accepted principles of statutory construction require a finding that the legislature intended to grant authority for circuit clerks to invest funds "in savings deposits in banks carrying federal deposit insurance to the extent of the insurance" only, and to the exclusion of discretionary authority to invest in any other manner. It is well settled that the express mention in a statute of one

Honorable Richard J. Rabbitt

thing implies the exclusion of another; where special powers are expressly conferred or special methods are expressly prescribed for the exercise of the power, other powers and procedures are excluded. Brown v. Morris, 365 Mo.946,290 S.W.2d 160; Lancaster v. Atchison County, 352 Mo.1039, 180 S.W.2d 706.

In City of Hannibal v. Minor, 224 S.W.2d 598 (St. Louis Court of Appeals), the court said:

" * * * There is a fundamental principle of construction which has been recognized and applied from time immemorial by our courts to such questions as we have here. It is embodied in the maxim: 'Expressio unius est exclusio alterius' which means that the express mention of one thing, person or place implies the exclusion of another. * * * "

In Attorney General Opinion No. 223, dated October 27, 1969, issued to Senator Don Owens, it was concluded that the Director of Revenue of the State of Missouri, as an insurer of that portion of the intangible personal property tax collected by him for local political subdivisions of the state, may deposit the moneys in bank time deposit accounts which draw interest. It should be observed, however, that no statute similar to Section 483.310, RSMo 1959, relating to circuit clerks governs the deposit of such moneys by the Director of Revenue. The existence of the statute in the present case requires the conclusion reached herein.

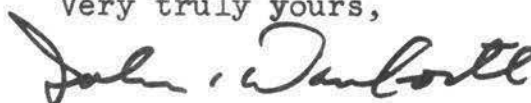
It is our view that the discretionary power given to circuit clerks of first class counties does not extend beyond the type of investments specifically set forth in the statute. Accordingly, it does not extend to or authorize investment in United States Treasury Notes.

CONCLUSION

Therefore, it is the opinion of this office that the Clerk of the Circuit Court of the City of St. Louis does not have discretionary authority to invest funds deposited in the registry of the court in United States Treasury Notes under Section 483.310, RSMo 1959.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John E. Park.

Very truly yours,



JOHN C. DANFORTH
Attorney General

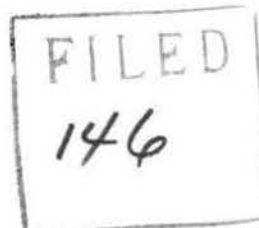
ELECTIONS:
REFERENDUM:
GENERAL ASSEMBLY:

The General Assembly may, in its discretion, set a special election date for a vote on a measure which has been referred to a vote of the people by a proper referendum petition.

OPINION NO. 146

January 22, 1970

Honorable John J. Johnson
State Senator, District 15
Room 420, Capitol Building
Jefferson City, Missouri 65101



Dear Senator Johnson:

This is in answer to your letter of recent date in which you ask whether the General Assembly has the authority to fix a date for an election on a referred measure on a date other than the date specified in the referendum petition requesting that the measure be referred to the people for a vote.

It is our view that the General Assembly has the power to determine the date upon which a vote is to be had at a special election when a referendum petition has been presented to the Secretary of State and such petition has been determined to be sufficient.

Section 52(b) of Article III of the Constitution of Missouri insofar as referendum elections are concerned provides in part as follows:

" . . . All elections on measures referred to the people shall be had at the general state elections, except when the general assembly shall order a special election. . . ."
(Emphasis added)

The language of the Constitution appears to be perfectly clear and specific in stating that all elections on measures referred to the people are to be held at the general state elections, that is the biennial November elections in even numbered years with the exception that the General Assembly does have the discretionary authority to order a special election on a measure referred to the people.

Section 126.020, RSMo 1959, provides a suggested petition form for the referendum to the people on a measure that has passed the General Assembly. Such section provides that the form set out

Honorable John J. Johnson

in such section shall be substantially the form of the petition to refer to a vote of the people a measure that has passed the General Assembly. Such section provides as follows:

"The following shall be substantially the form of petition for the referendum to the people on any law passed by the general assembly of the state of Missouri:

WARNING

It is a felony for anyone to sign any initiative or referendum petition with any name other than his own, or to knowingly sign his name more than once for the same measure, or to sign such petition when he is not a legal voter.

PETITION FOR REFERENDUM

To the Honorable, Secretary of State for the state of Missouri:

We, the undersigned, citizens and legal voters of the state of Missouri (and the county of), respectfully order that the senate (or house) bill No., entitled (title of law), passed by the general assembly of the state of Missouri, at the regular (special) session of said general assembly, shall be referred to the people of the state, for their approval or rejection, at the regular (special) election to be held on the day of, A. D. 19--, and each for himself says: I have personally signed this petition; I am a legal voter of the State of Missouri and county of, my residence and post office are correctly written after my name.

Name, Residence,
Post office,
(If in a city, street and number.)

(Here follow numbered lines for signatures.)"

Such suggested form enacted by the legislature provides that the petition can contain the provision that the measure to be referred will be voted on at a regular or special election to be held

Honorable John J. Johnson

on a date to be inserted in the petition. The Constitution of Missouri in Section 52(b) of Article III, supra, specifically and clearly specifies the elections at which measures may be referred to a vote of the people and states that all such measures must be referred either at the regular November biennial elections or at a special election to be ordered at the discretion of the General Assembly. No other provision is found in the Constitution for such elections and there is no authority for the legislature to enact any legislation contrary to a clear specific constitutional provision. Therefore, the suggested form of petition found in Section 126.120, insofar as it purports to provide for a specific election date in a petition for a referendum, is beyond the power of the legislature to enact. It follows that it is beyond the power of the persons signing or submitting a referendum petition to determine the date of the referendum election.

In the case of State v. Missouri Workmen's Compensation Commission, 2 S.W.2d 796, the Supreme Court succinctly pointed out the fact that the Constitution prevails over any contrary legislative enactment. The court said l.c. 799:

" . . . The voice of the Constitution is stronger than that of the Legislature, and stronger than all of the rules of construction, supra, as urged by the Attorney General in behalf of the commission. If there be conflict, both legislative acts and rules of construction must fall before unambiguous and plain constitutional provisions. . . ."

In view of the fact that the Constitution provides for the election dates for referred bills, it is clear that the provision in Section 126.020 purporting to authorize the setting of a date for a referendum election by those signing or submitting the petition is unconstitutional, invalid and void.

Section 25 of Article II of the Constitution of North Dakota provides in part as follows:

"Each measure initiated by or referred to the electors, shall be submitted by its ballot title, which shall be placed upon the ballot by the Secretary of State and shall be voted upon at any state-wide election designated in the petition, or at a special election called by the Governor. . . ."

The Supreme Court of North Dakota in the case of State ex rel. Frazier v. Hall, 197 N.W. 687 held that such constitutional provision did authorize the Governor to set a special election date for the referendum election. The court said l.c. 688:

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"The precise question presented upon this appeal is whether the Governor has the power, pursuant to the constitutional provisions quoted, to call a special election in advance of the time designated by petitioning electors in referendum petitions. In answering this question, we are clearly of the opinion that the language of the constitutional provisions and intent thereof, considered in connection with the cognate law, contemplated and gave the power to petitioning electors to designate in referendum petitions a time when referred acts, not emergency measures, might be submitted to the electors at any state-wide election, and also gave to the Governor the power to accelerate the time of holding an election upon such referred measures by calling a special election. These alternative powers so granted to the petitioning electors and to the Governor are consistent with the fundamental theory of checks and balances, and act as checks one upon the other, so that the petitioning electors, if they so desire, may fix the time beyond which such election may not be deferred, and, on the other hand, so that the Governor, if in his judgment the exigencies of the situation so require, may accelerate the time designated by calling a special election."

Under the North Dakota Constitution, of course, the petitioners did have the right to designate a general election date at which the election was to be held on the referred bill, whereas the general biennial election date is specifically set out in the Missouri Constitution itself. The court interpreting a constitutional provision similar to that of Missouri held that the constitutional provision authorizing a special election to be called by the Governor specifically granted him discretionary authority to set a special election date before the general election designated in the petition. Insofar as the Missouri Constitution is concerned, of course, the power is given to the General Assembly rather than the Governor to set the special election date.

Section 3 of Article V of the Constitution of Oklahoma provides in part as follows:

". . . All elections on measures referred to the people of the State shall be had at the next election held throughout the State, except when the Legislature or the Governor shall order a special election for the express purpose of making such reference. . . ."

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In the case of Simpson v. Hill, 263 P. 635, the Supreme Court of Oklahoma decided a case in which it was necessary to determine whether or not a measure submitted by the initiative was passed at an election. The facts as stated by the court showed that the Governor had in August issued his proclamation under authority and by direction of the legislature calling a special election for October 2 for a vote on certain constitutional amendments proposed by the legislature of the state. After the Governor made such proclamation setting a special election date, initiative petitions were filed proposing a certain measure. The initiated measure was placed on a ballot at the special election and received a majority vote. The Governor did not issue any proclamation or order directing that the initiated measure be voted on at such election nor did the legislature make any such direction. The court held that the initiated measure was not properly adopted because there was no setting of a special election date at which such initiative measure was to be submitted either by the Governor or the legislature. The court said l.c. 637:

". . . The Legislature did not order that this initiated measure be submitted at the said election. Neither did the Governor issue any proclamation or order directing the submission of the same to the people of the state of Oklahoma on said date, or on any other date when an election was held. There being no order of the Legislature, or the Governor, the question is, Did the affirmative vote in favor of the said initiative measure give it any force and effect as law?

* * * *

"Sections 2 and 3 of article 5 of the Constitution deal with the question of initiating measures, and referring same to a vote of the people. In section 3 is found this language:

"All elections on measures referred to the people of the state shall be had at the next election held throughout the state, except when the Legislature or the Governor shall order a special election for the express purpose of making such reference."

"It is clear that such initiative measures must go to the next regular general election held throughout the state, unless the Governor or the Legislature shall order that it be

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submitted at a special election. The election of October 2, 1923, was a special election.

"Not having been submitted at the said special election by direction of the Governor or the Legislature, initiative measure No. 79 was not presented for consideration of the people as by the Constitution of the state directed, and it has no force and effect. . . ."

The Supreme Court of Oklahoma in such case recognized the authority of the Governor or the General Assembly to set a special election date but held that where no such date had been set the measure could not be adopted at the special election for constitutional amendments submitted by the legislature.

In the case of Updegraff v. Gary, 298 P.2d 404, the Supreme Court of Oklahoma refused to issue a writ of mandamus requiring the Governor to designate the primary election date as a "special election" for all initiative petitions and referred measures accepted by the Secretary of State of which the Governor had been notified. The court held that under the Oklahoma Constitution the Governor had a discretionary power to determine whether or not he would call a special election for the purpose of voting on a measure submitted by the initiative or on a measure to be referred and that such discretion could not be controlled by a court but could be exercised by the Governor as he saw fit. The court said l.c. 406:

"It appears from the foregoing that the Governor may, in his discretion, call a special election for the submission of an initiated or referred measure, or he may, in his discretion, designate the mandatory primary election as a special election for such purpose. . . ."

We believe from the plain provisions of the Constitution of Missouri and the interpretation that has been placed on similar provisions in constitutions of other states that the Missouri Constitution itself sets the election date for referred measures as the November biennial election date or the special election date that the General Assembly may, in its discretion, order for any referred measure.

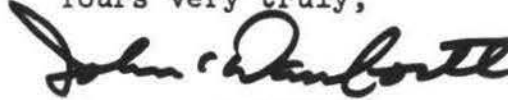
CONCLUSION

It is the opinion of this office that the General Assembly may, in its discretion, set a special election date for a vote on

Honorable John J. Johnson

a measure which has been referred to a vote of the people by a proper referendum petition.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is written in a cursive style with a large, prominent initial "J".

JOHN C. DANFORTH
Attorney General

February 3, 1970

OPINION LETTER NO. 147
(Answered by Letter-Klaffenbach)

Honorable James Russell
Representative, 25th District
700 Bellarmine Lane
Florissant, Missouri 63031



Dear Representative Russell:

This letter is in response to your opinion request in which you ask whether or not a school board which furnishes transportation to and from school for pupils living over one mile from school is required to furnish such transportation to all such students or whether the board may refuse to furnish transportation to a kindergarten student who lives on a court located beyond the one-mile limit. You further advise that this student is the only one on the street that is beyond the one-mile distance and that the board does not think that it is feasible to furnish transportation for one child and pass up other children on the same street because they do not live over the mile limit.

Section 167.231, RSMo Supp. 1967, provides as follows:

"Within all school districts except metropolitan districts the school board shall provide transportation to and from school for all pupils living more than three and one-half miles from school and may provide transportation for all pupils living one mile or more from school. When the school board deems it advisable, or when requested by a petition signed by ten taxpayers in the district, to provide transportation to and from school at the expense of the district for pupils living more than one-half mile from the school, the board shall submit the question at an annual or biennial meeting or election or a special meeting or election called for the purpose. Notice of the meeting

Honorable James Russell

or election shall be given as provided in section 162.061, RSMo. If two-thirds of the voters, who are taxpayers, voting at the election or meeting, are in favor of providing the transportation the board shall arrange and provide therefor."

Section 167.231 of the Laws of 1963 provided:

"Within all school districts except metropolitan districts the school board shall provide transportation to and from school for all pupils living more than three and one-half miles from school and may provide transportation for all pupils living one mile or more from school whether in the original district, or in annexed territory."

In *State v. Smith*, 196 S.W.115 (1917), the Springfield Court of Appeals considered a situation where a school district was formed by consolidating several school districts and the children in one area were provided transportation, but not the children in the other areas. The Court stated that:

" * * * The whole district is taxed to create an incidental fund, and if used at all for transportation it must be used without partiality or discrimination. As above stated, the school directors were transporting certain children out of the incidental fund under authority of a vote which was taken and the transportation of children was adopted in the district. It thereupon became the duty of the directors to transport all the children in the district falling without the 2 1/2-mile line irrespective of their particular location."

In view of this holding by the Court, we are constrained to conclude that when, as here, the school board furnishes transportation to students located over one mile from the school, the board must furnish such transportation to all such students irrespective of their location and are not permitted to discriminate or show partiality.

In *State v. Tompkins*, 203 S.W.2d 881 (1947), the St. Louis Court of Appeals stated at 883:

"[4] When transportation in a school district has been voted it is the duty of the Board of Directors or Board of Education to provide for such transportation, providing money is available in the incidental fund of the district to meet the expense thereof, and if the Board,

Honorable James Russell

without reasonable cause therefor, fails to provide transportation, it may be compelled to do so by mandamus. However, this does not mean that the court may by the hard and unyielding writ of mandamus substitute its discretion for that of the Board as to the means and manner and sufficiency and safety of the transportation to be furnished. * * * "

We are also enclosing Opinion No. 21, dated March 18, 1969, to Mr. Hubert Wheeler, which is self-explanatory.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Encls:
Op.21-69-Wheeler

POLITICAL SUBDIVISIONS: Section 369.325, RSMo 1969, does
SAVINGS AND LOAN: not violate Article VI, Section
COUNTIES: 23 of the Missouri Constitution
CITIES, TOWNS AND VILLAGES: of 1945, and that any municipality
or political subdivision of the
State of Missouri may legally invest its funds in a savings and
loan association pursuant to those conditions set out in paragraph
1 of Section 369.325, RSMo 1969.

OPINION NO. 148

October 5, 1970

Honorable Zane White
Prosecuting Attorney
Phelps County Court House
Rolla, Missouri 65401



Dear Mr. White:

You requested this office's opinion with regard to the following matter:

"Does the Phelps County Court have authority to invest county funds in savings and loan associations. . . ."

Section ⁶⁹396.325, RSMo 1969, provides as follows:

"1. Accounts of any association doing business in Missouri, whether chartered by the state of Missouri or another state or the United States of America, and which holds certificate of insurance from the Federal Savings and Loan Insurance Corporation:

* * *

"(3) Shall be legal investments for funds of any municipality or political subdivision of the state of Missouri;"

The above statute authorizes the investment which your county court contemplates. However, in Attorney General's Opinion No. 87, delivered March 16, 1959, to Paul R. Sims, then Supervisor of the Division of Savings and Loan Supervision of Missouri, this office ruled that paragraph (3) of Section 369.325, RSMo 1969, when read in conjunction with paragraph 1 of said section, was in violation of Article VI, Section 23 of the Missouri Constitution of 1945, and

Honorable Zane White

that it was, therefore, unconstitutional for a municipality or political subdivision of the State of Missouri to invest its funds in a savings and loan association. Article VI, Section 23 of the Missouri Constitution of 1945 provides:

"No county, city or other political corporation or subdivision of the state shall own or subscribe for stock in any corporation or association, or lend its credit or grant public money or thing of value to or in aid of any corporation, association or individual, except as provided in this Constitution."

For the following reasons, Opinion No. 82, March 16, 1959, has been withdrawn.

The issue raised by your opinion request is whether the investment of these funds in a Savings and Loan Association would come within Article VI, Section 23 of Missouri's Constitution which provides that a county may not:

". . . own or subscribe for stock in any corporation or association."

Thus, it must be determined whether a deposit of money by a municipality or political subdivision of the State of Missouri in a savings and loan association constitutes the ownership of corporate stock.

In the case of In Re Estate of Morey, 38 Ill.2d 575, 232 N.E.2d 734 (1967), the Supreme Court of Illinois was concerned with the question of whether a withdrawable capital account in a savings and loan association was jointly or individually owned. Under Illinois law, the creation of joint rights in a bank account required the execution of a written agreement to that effect signed by the parties, whereas in the case of corporate stock, the simple registration of ownership on the corporation books in the appropriate statutory language was sufficient to create joint rights in the stock. Id. at 232 N.E.2d 736. In holding that the savings and loan deposits were not corporate stock, the Illinois Supreme Court noted:

". . . there are important factual distinctions between this certificate and a share of corporate stock which mitigate against treating them alike. Whereas a share of corporate stock may not be issued until consideration in the amount of its par or stated value is received . . . , the instant certificate could be and

Honorable Zane White

was issued with payment of its matured value to be made by installments and the crediting of association dividends. In addition, all or part of the capital paid in for the certificate was withdrawable at will before or after full payment of the matured value of the share. These factors unquestionably indicate that the certificate cannot properly be considered in the category of a corporate stock and substantiate our conclusion, based on the statutory provisions, that the certificate represents a withdrawable capital account. . . ." Id. at 737

In Porter v. Aetna Casualty and Surety Company, 370 U.S. 159, 8 L.Ed.2d 407, 82 S.Ct. 1231 (1962), a judgment creditor of an incompetent air force veteran attached two accounts in a federal savings and loan association which had been established by the veteran's committee with funds received from the Veterans' Administration as disability compensation for the veteran. The issue was whether the funds in the account were exempt from attachment under 38 U.S.C., Section 3101(a), which provides that payments of benefits due or to become due under any law administered by the Veterans' Administration shall be exempt from the claim of creditors and shall not be liable to attachment, levy or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. The Supreme Court noted that the exemption was lost when the funds "'lost the quality of money'" and were converted into "permanent investments." Id. 370 U.S. at 160. Thus, the issue was whether the money deposited in the savings and loan association lost the quality of the monies and thus became converted into a permanent investment. In holding that the deposits retain the quality of monies, the Supreme Court stated:

"... a withdrawal from the accounts here involved could be made 'as quickly as a withdrawal from a checking account. . . .' In addition, the integrity of the deposits was assured by federal supervision of the associations plus federal plus federal insurance of the accounts. Under such conditions the funds were subject to an immediate and certain access and thus plainly had 'the quality of moneys'. . . ." Id. 370 U.S. at 161-162

Thus, the Supreme Court emphasized that a savings and loan account was neither speculative nor a permanent investment because the account was insured by the FSLIC and because it was readily convertible into cash.

Honorable Zane White

Finally, it should be noted that in 1969, the Seventy-fifth General Assembly of the State of Missouri amended Section 369.310, RSMo 1969, which prior to the amendment, prohibited an association from accepting deposits of money or agreeing to pay interest or a guaranteed rate of dividends. The newly enacted Section 360.310, RSMo 1969, provides in relevant part as follows:

" . . . An association may raise capital in the form of such savings deposits or other accounts, for fixed, minimum, or indefinite periods of time (all of which are referred to in this section as savings accounts and all of which shall have the same priority upon liquidation) as are authorized Holders of savings accounts of an association shall, to such extent as may be provided by its by-laws or by regulations of the supervisor, be members of the association, and shall have such voting rights and such other rights as are thereby provided. . . ."

Thus, as amended, Section 369.310, RSMo 1969, allows a savings and loan association, when authorized by its bylaws or by regulation of the supervisor, to establish savings accounts for fixed or indefinite periods of time. The specific prohibition against an agreement to pay interest in the prior statute was deleted. However, this section is an enabling section only because it requires that the changes contemplated may be adopted as authorized by the bylaws of the association or by regulation of the supervisor.

Investments in savings and loan association are legally sui generis. Such investments do not involve the risk of fluctuation associated with the value of corporate stock. Deposits in a savings and loan association are insured by the Federal Savings and Loan Insurance Corporation, which guarantees the security of at least a portion of the investment. The savings and loan industry is regulated by Chapter 369, RSMo 1969, and the regulatory scheme contemplated by this chapter is comparable to that under which the banking industry is regulated. Savings and loan associations are restricted as to the type of investments that may be made with monies deposited with them, the fiscal condition of the institution is subject to periodic examination by the regulatory authorities, and the establishment of new offices must be approved by the supervisor. Regulation is thus comparable to the banking industry rather than to industrial corporations. It is recognized that a depositor in a savings and loan institution has certain rights other than a depositor in a bank. For example, a depositor in a savings and loan association has certain managerial rights not available to a depositor in a banking institution. Section 369.310, RSMo 1969. That

Honorable Zane White

a deposit in a savings and loan institution has legal attributes which differ from a deposit in a banking institution is, however, not controlling. Rather, the distinction between a deposit in a savings and loan association as compared to the prohibited investment in Article VI, Section 23, must be the determining factor.

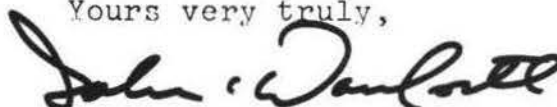
In our opinion, the characteristics of a deposit in a savings and loan association are sufficiently dissimilar to those of an investment in corporate stock so as not to violate Article VI, Section 23 of Missouri's Constitution. Thus, Section 369.325(1) (3), RSMo 1969, does not violate Article VI, Section 23 of the Missouri Constitution.

CONCLUSION

It is, therefore, our conclusion that Section 369.325, RSMo 1969, does not violate Article VI, Section 23 of the Missouri Constitution of 1945, and that any municipality or political subdivision of the State of Missouri may legally invest its funds in a savings and loan association pursuant to those conditions set out in paragraph 1 of Section 369.325, RSMo 1969.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Craft.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

SCHOOLS:
CONTRACTS:
SCHOOL CONTRACTS:

1. The superintendent's contract was automatically renewed for the 1969-1970 school year pursuant to Section 168.111, RSMo 1967 Supp. 2. The resolution of the school board in

April 1969 to extend the superintendent's contract for the 1970-1971 school year did not result in a valid employment contract for the school year 1970-1971. 3. The School Board may refuse to renew the superintendent's contract for the school year 1970-1971 in the manner provided by Section 168.111, RSMo 1967 Supp. 4. The extent to which the school board can direct control and specify the duties of the superintendent depends on the terms of the superintendent's contract and on the provisions of Section 168.121, RSMo 1967 Supp. pertaining to the construction of such contracts.

OPINION NO. 149

April 9, 1970



Honorable Don W. Kennedy
State Representative
One Hundred Twelfth District
127 West Austin Boulevard
Nevada, Missouri 64772

Dear Representative Kennedy:

This opinion is in response to your request for an official ruling on six questions pertaining to the powers of a six director district to contract with a superintendent.

The facts set forth in the attachment to your opinion request are as follows:

"Nevada R-5 School District is a six director school district. The Superintendent of Schools has served for 22 years. He is employed on a 12 month basis for a school year commencing on July 1st and running to the following June 30th.

"The school board in the past has, by resolutions from time to time, extended the superintendent's contract of em-

Honorable Don W. Kennedy

ployment one to two years beyond the current school year in order to protect him from a hostile board and to give him security. His salary has been set each spring, at the same time as the rest of the school administrators, for the coming year.

"For the last few years the superintendent has presented the names of teachers to be employed to the Board for approval and after approval has handled the preparation of contracts to be tendered the teachers on or before May 1st, covering their re-employment for the coming year, and has obtained the signatures of the President of the Board and of the teacher. It has been the practice of the board to set a salary schedule for all teachers sometime prior to the issuing of contracts, usually based on the prior year's salaries and then to grant an increase to the teachers after their contracts are signed, conditioned on necessary state aid being available. The teachers also have been receiving supplemental compensation based on their additional assignments beyond a regular teaching load. Usually the administrators salaries are set at a later meeting of the board after the regular teachers salaries have been set. In recent years the Superintendent apparently has not prepared a written contract for himself nor obtained the signature of the President of the Board nor signed a contract himself.

"At the meeting of the school board after the annual school election to certify the election results and to issue certificates of election to the two new members of the board, held on April 1, 1969, the school board, by formal resolution, extended the superintendent's contract of employment for an additional school year beyond what had previously been authorized, i.e., from July 1, 1970 to June 30, 1971. No salary was set at

Honorable Don W. Kennedy

this time. No written contract was ever tendered or signed.

"In the month of April, 1969, the administrators salary schedule was finally approved and authorized a salary of \$17,000.00 for the superintendent for a 12 month year running from July 1, 1969 to June 30, 1970.

"In October, 1969, the school board gave the superintendent a year's leave of absence with full pay. Thereafter the superintendent tendered his resignation, conditioned on being paid his full salary through June 30, 1971. No action was taken by the board and in January, 1970, the superintendent advised the board his resignation was withdrawn."

Based on the foregoing facts you have asked the opinion of this office on the following questions:

"1. Does the superintendent have a contract of any kind or was he re-employed for the 1969-1970 school year because of lack of notification under R.S.M. Sec. 168.111?

"2. If the superintendent has a contract, is it for the school year 1969-1970 or for more than one year, and at what salary?

"3. If the superintendent has a contract for only the school year 1969-1970, then can the Board terminate his employment at the end of such school year in the manner provided by R.S.M. Sec. 168.111?

"4. If the superintendent has a contract for more than one year, can the school board change his salary to whatever amount it sees fit for the school year 1970-1971?

"5. To what extent can the board direct, control, and specify the duties of the superintendent?

"6. If the superintendent has a contract beyond the school year 1969-1970, can the

Honorable Don W. Kennedy

contract be terminated by the mutual consent of the superintendent and the board, and would the board be authorized to pay to the superintendent in lump sum settlement an amount equal to his salary for the balance of the remaining years of his alleged employment, i.e., until June 30, 1971?"

I.

Renewal of the superintendent's contract is governed by the provisions of Section 168.111, RSMo 1967 Supp. Although Section 168.111 refers by its terms to teachers, "teacher" is defined in the first paragraph of Section 168.111 as follows:

"1. The word 'teacher' for the purpose of this section means any person employed in the public schools of this state in a position for which certification is required."

Pursuant to the classification standards of the State Board of Education, a superintendent must hold a superintendent's certificate. Therefore, Section 168.111 would govern a superintendent's reemployment. See the School Administrators Handbook (State Board of Education 1969) pp. 122-123.

Furthermore, "teacher" as used in Section 168.101, RSMo 1967 Supp., has been interpreted as including superintendents. See Lemasters v. Willman, 281 S.W.2d 580 (St.L. Ct.Apps., 1955). Although Section 168.101 pertains only to the original employment of a superintendent (Section 168.111, paragraph 2), there is no indication that superintendents should be included in the definition of "teacher" in one section but not in the other.

Having determined that Section 168.111 governs the reemployment of superintendents, the pertinent provisions of that section are as follows:

"3. Each school board having one or more teachers under contract shall notify each teacher in writing concerning his reemployment or lack thereof on or before the fifteenth day of April of the year in which the contract then in force expires. Failure on the part of a board to give the notice constitutes reemployment on the same terms as those provided in the contract of the cur-

Honorable Don W. Kennedy

rent fiscal year; and not later than the first day of May of the same year the board shall present to each teacher not so notified a regular contract the same as if the teacher had been regularly reemployed.

* * *

"5. Any teacher who is informed of reelection by written notice or tender of a contract shall within fifteen days thereafter present to the employing board a written acceptance or rejection of the employment tendered and failure of a teacher to present the acceptance within such time constitutes a rejection of the board's offer."

Assuming that the superintendent had a valid contract for the 1968-1969 school year and assuming that the board had not already entered into a written contract with the superintendent for the 1969-1970 school year prior to its meeting in early April, 1969, the failure of the board prior to April 15, 1969 to notify the superintendent that he had or had not been reemployed would have resulted in his automatic reemployment on the same terms as the 1968-1969 contract. See paragraph 3 of Section 168.111. Automatic reemployment is only for one year, i.e., the school year beginning on the following July 1. Magenheim v. Board of Education, 347 S.W.2d 409 (St.L. Ct.Apps., 1961) and Williams v. School Dist. of Springfield R-12, 447 S.W.2d 256, 260 (Mo. Div. 2, 1969).

II.

At the school board meeting on April 1, 1969, the board passed a resolution purporting to extend the superintendent's contract for the school year 1970-1971. In our view a valid contract for the school year 1970-1971 did not result from the passage of this resolution. We have not been advised that the board's action was communicated in writing to the superintendent as required by paragraph 3, Section 168.111. Therefore, although the board may have passed a resolution, a written offer was never delivered to the superintendent. Even if such a written offer was delivered to the superintendent, we have not been advised that the superintendent presented within 15 days thereafter a written acceptance of the offer. Not having done so "constitutes rejection of the board's offer." Paragraph 5, Section 168.111.

In view of the fact that we hold there was no valid contract for the 1970-1971 school year, we deem it unnecessary to decide whether the board had the authority to enter into such a contract under these circumstances.

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III.

Having determined above that the superintendent has a contract only for the school year 1969-1970, it follows that the school board can decide not to reemploy him for the school year beginning on July 1, 1970, if it acts prior to April 15, 1970 pursuant to Section 168.111.

IV.

Having determined that the superintendent has a contract for only the school year 1969-1970, we do not believe it necessary to answer this question.

V.

The relationship between the superintendent and the board is governed primarily by the terms of the contract entered into between the parties. In Section 168.121, RSMo 1967 Supp. the following appears:

" . . . The faithful execution of the rules and regulations furnished by the board shall be considered as part of the contract if the rules and regulations are furnished to the teacher by the board when the contract is made. If the teacher fails or refuses to comply with the terms of the contract or to execute the rules and regulations of the board, the board may refuse to pay the teacher, after due notice in writing is given by order of the board, until compliance therewith is rendered. . . . "

VI.

This is not being answered because we have previously determined the superintendent does not have a contract beyond the school year 1969-1970 under the facts as stated in your opinion request.

CONCLUSION

Therefore, it is the opinion of this office that:

1. Under the facts stated in your opinion request, the superintendent's contract was automatically renewed for the 1969-1970 school year pursuant to Section 168.111, RSMo 1967 Supp.

Honorable Don W. Kennedy

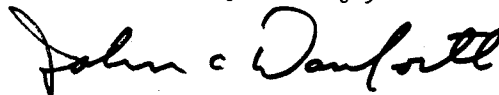
2. Under the facts furnished in the opinion request, the resolution of the school board in April 1969 to extend the superintendent's contract for the 1970-1971 school year did not result in a valid employment contract for the school year 1970-1971.

3. The School Board may refuse to renew the superintendent's contract for the school year 1970-1971 in the manner provided by Section 168.111, RSMo 1967 Supp.

4. The extent to which the school board can direct control and specify the duties of the superintendent depends on the terms of the superintendent's contract and on the provisions of Section 168.121 RSMo 1967 Supp. pertaining to the construction of such contracts.

The foregoing opinion, which I hereby approve, was prepared by my assistant, D. Brook Bartlett.

Yours very truly,

A handwritten signature in cursive script, reading "John C. Danforth".

JOHN C. DANFORTH
Attorney General

Answer by letter-Wood

October 2, 1970

OPINION LETTER NO. 150

Honorable George M. Cook
State Representative
District No. 162
P. O. Box 37
Caruthersville, Missouri 63830



Dear Representative Cook:

You have requested my opinion as to the legal ownership of Wolf Bayou in Pemiscot County. We are advised by the Missouri Geological Survey that Wolf Bayou, in Sections 3 and 4, Township 19 North, Range 13 East, was in all probability at one time a channel but not necessarily a navigable channel of the Mississippi River. The Lower Mississippi Division of the Corps of Engineers informs us that in 1820, upon Missouri's entry into the Union, Wolf Bayou was probably not a navigable stream but instead a minor drainage channel useful only to very small boats.

The title to lands underlying navigable waters was reserved to the respective states upon their admission to the Union (*United States v. State of Oregon*, 295 U.S. 1, 6, 14, 79 L.Ed. 1267, 1270, 1274 (1934)). Whether or not particular waters are navigable is a federal question (*United States v. State of Oregon*, supra, 79 L.Ed. at 1274). In the case just cited, the United States Supreme Court concluded that three natural lakes and their connecting channels were not navigable when Oregon was admitted to the Union in 1859, and thus, the beds of these bodies of water did not belong to the State of Oregon.

"The evidence, taken as a whole, clearly establishes the flat topography of the disputed area, the shallow water without defined banks, ice bound from three to four months of the year, the separation of areas covered by water of sufficient depth to float boats, the presence of

Honorable George M. Cook

tules and other forms of water vegetation, a dry season every year, and frequent dry years during which Mud and Harney Lakes are almost entirely without water, and Lake Malheur is reduced to a relatively few acres of disconnected ponds surrounded by mud. These conditions preclude the use for navigation of the area in question, in its natural and ordinary condition, according to the customary modes of trade or travel over water, and establish an absence of that capacity for general and common usefulness for purposes of trade and commerce which is essential to navigability. . . . At most the evidence shows such an occasional use of boats, sporadic and ineffective, as has been observed on lakes, streams or ponds large enough to float a boat, but which nevertheless were held to lack navigable capacity. . . ." (Emphasis added) (United States v. Oregon, supra, 79 L.Ed. at 1278)

The plat of the original United States Survey of Township 19 North, Range 13 East, dated April 21, 1848, recites that it is based on surveys conducted in 1820-1821 for the outer boundaries, and 1847 for the subdivision and various meander lines. The 1820-1821 survey would have included the north line of Section 3 and the plat reflects no body of water along this line. The 1847 survey of the subdivision lines for Sections 3 and 4 is reflected on the plat to show a lake that is approximately centered on the West Quarter Corner of Section 3 - East Quarter Corner of Section 4 and a narrow bayou traversing the line between Sections 3 and 4 south of the lake. The 1956 Edition, United States Army Corps of Engineers Portageville Quadrangle topographic map shows the 1847 lake as a dry ground depression and a body of water extending from the north line of Section 3 in a south and west arc to the west line of Section 4, designated Wolf Bayou. This body of water is not indicated on the 1847 plat, and we conclude that Wolf Bayou, as it exists today, was not "navigable water" at the time of Missouri's admission to statehood.

"To meet the test of navigability as understood in the American law a water course should be susceptible of use for purposes of commerce or possess a capacity for valuable floatage in the transportation to market of the products of the country through which it runs. It should be of practical usefulness to the public as a public highway in its natural state and without the aid of artificial means. A theoretical or potential navigability, or one that is temporary,

Honorable George M. Cook

precarious, and unprofitable, is not sufficient. While the navigable quality of a water course need not be continuous, yet it should continue long enough to be useful and valuable in transportation; and the fluctuations should come regularly with the seasons, so that the period of navigability may be depended upon. Mere depth of water, without profitable utility, will not render a water course navigable in the legal sense, so as to subject it to public servitude, nor will the fact that it is sufficient for pleasure boating or to enable hunters or fishermen to float their skiffs or canoes. To be navigable a water course must have a useful capacity as a public highway of transportation. . . ." (Harrison v. Fite, 148 Fed. 781, 783-784 (8th Cir. 1906))

Being nonnavigable waters, the underlying land could be disposed of like any other lands by the United States. Carlton's Abstracts of the Pemiscot County land records show that the United States made the following dispositions in Sections 3 and 4, Township 19 North, Range 13 East:

- (1) Direct entry of W1/2, SW1/4, Section 4, by John P. Faust; September 12, 1848
- (2) Direct entry of SE1/4, SW1/4, Section 4, by Elizabeth Lee; October 8, 1849
- (3) Direct entry of NE1/4, SW1/4, Section 4, by W. W. Outlaw; October 14, 1849
- (4) Direct entry of N1/2, NW1/4, Section 3, by Joseph Labuxien; December 4, 1849
- (5) Swampland Patent No. 3, August 22, 1856, to State of Missouri: SE1/4, Section 4; E Fractional 1/2, Section 3; Lot 1, NW1/4, Section 3; SW1/4, Section 3
- (6) Swampland Patent No. 16, March 13, 1878, to State of Missouri: NE Fractional Part of SE1/4, Section 3; Fractional Part of NE1/4, Section 3

The State of Missouri in turn issued swampland patents to Pemiscot County, pursuant to present Sections 241.010, et seq, RSMo, in Sections 3 and 4, Township 19 North, Range 13 East as follows:

Honorable George M. Cook

Swampland Patent No. 16, March 1, 1870, to
Pemiscot County; E Fractional 1/2, Section 3;
Lot 1 of NW1/4, Section 3; SW1/4 of Section 3;
SE1/4 of Section 4

Thus, any interest held by the State of Missouri to the title to the land underlying the major portions of Wolf Bayou, as the Bayou is located in the 1956 Portageville Quadrangle map, was divested in 1870. The course of this title since then could only be determined upon preparation and examination of abstracts of title to the property.

Yours very truly,

JOHN C. DANFORTH
Attorney General

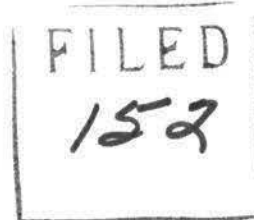
ROADS AND BRIDGES:

A county which acquires a road less than 30 feet wide by prescription pursuant to Section 228.190, RSMo Supp. 1967, cannot take private land from adjoining landowners in order to widen said road without instituting proceedings in the Circuit Court.

OPINION NO. 152

July 10, 1970

Honorable Kenneth R. Babbitt
Prosecuting Attorney
Stone County Court House
Box 185
Galena, Missouri 65656



Dear Mr. Babbitt:

This is in reply to your request for an official opinion from this office. Your request reads as follows:

". . . There has been a road located in the southern part of Stone County which has been used by the public for over 10 years and public money has been expended on the maintenance of said road for over 10 years. It appears, then, that this is a legally established public road under Sec. 228.190.

"The roadbed on said road has never been over 12 to 14 feet wide, and the landowner adjacent to the road, who, incidently, owns on both sides of said road, has fenced on both sides of said road leaving a distance between fences of only, about, 20 feet.

"Query: Under 229.010, all public roads shall not be less than 30 feet

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in width.

"Can the County Court of Stone County, or the road district in which area the road lies, widen this road and cause the fences of the landowner to be set back 15 feet from the center line of the now existing road so as to constitute a 30 foot road right-of-way without instituting any proceedings in said County Court or Circuit Court."

It is our understanding that no order of the County Court was ever entered establishing this road but that such road was legally established by use by the public for ten years continuously and upon which road there was expended public money for ten years.

A county road acquired by the public by prescription gives the public use only of the land actually used for road purposes. Eckerle v. Perry, 297 S.W. 424, 425 (Spr.Ct.App. 1927). Furthermore, in the case of State ex rel McIntosh v. Haworth, 124 S.W.2d 653, (Spr.Ct.App. 1939), the court stated:

" . . . under the statutes of Missouri, no highway could be established as a public highway by prescription since 1887 unless public money or labor had been expended on it and in order to establish a highway as a public highway by prescription where there has been no expenditure of public money or labor thereon there must be proof of adverse user for the statutory period of ten years prior to 1887. . . ." Id. at 654.

Therefore, the highway referred to in your request has been acquired by Stone County by prescription. Where a road is acquired by a county by prescription, the public has a right only to that portion actually used or maintained by the county. Hall v. Flagg Special Road Dist., 296 S.W. 164 (Spr.Ct.App. 1927). In the case of Eckerle v. Perry, supra., the court stated:

" . . . When the public acquires a right to a roadway by prescription that right extends only to the land actually used for road purposes. It is entirely different when a road has been established by condemnation

Honorable Kenneth R. Babbitt

or statutory dedication. In that event the public has the right to the entire road so condemned or dedicated regardless of whether or not the entire width of the road, as established, is actually used for travel. . . ." Id. at 425.

In addition, in the case of Drydale v. Kiser, 413 S.W.2d 506, Mo. 1967, the court considered the effect of Section 229.010, RSMo 1959, on Section 228.190 RSMo Supp. 1967, and said:

"Leslie v. Mathewson, and in particularly in State v. Lewis, the roads were far less than 30 feet wide-- '[a]ll public roads in this state which hereafter may be established shall not be less than thirty feet in width,' RSMo 1959, § 229.010, V. A.M.S. The point was not made in those cases as it is here that 'no public road can be less than 30 feet in width' but the appellants only cite the statute and that is not in itself sufficient to demonstrate that a public road created under the statute involved here, § 228.190, is invalid merely because its dimensions do not meet the standard. . . ." Id. at 509.

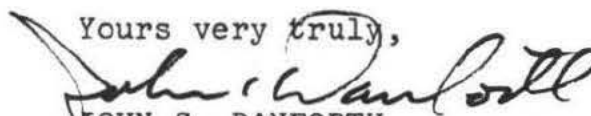
Therefore, it seems clear that Stone County could maintain a road acquired by prescription which is less than 30 feet wide. Acquisition by prescription pursuant to Section 228.190 RSMo Supp. 1967, does not give the County the right to take up to 30 feet of land from the adjacent landowners without condemnation proceedings.

CONCLUSION

It is therefore the opinion of this office that a county which acquires a road less than 30 feet wide by prescription pursuant to Section 228.190, RSMo Supp. 1967, cannot take private land from adjoining landowners in order to widen said road without instituting proceedings in the Circuit Court.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Harvey M. Tettlebaum.

Yours very truly,


JOHN C. DANFORTH
Attorney General

ELECTIONS:
POLITICAL PARTIES:
PRIMARY ELECTIONS:
CANDIDATES:

A new political party which received more than two percent of the vote cast in the last general election (November 5, 1968) for its statewide candidate is an "established political party" and entitled to participate in the August 1970 primary elections in the state and its political subdivisions.

OPINION NO. 153

April 1, 1970

Honorable G. William Weier
Prosecuting Attorney
Jefferson County
P. O. Box 246
Hillsboro, Missouri 63050



Dear Mr. Weier:

This is in reply to your request for an official opinion from this office as follows:

" . . . [U]nder these Statutes [Sec. 120.140, RSMo 1959] on definitions has the American Party who had no gubernatorial or local candidates running for office become an established political party and thereby removed itself from the requirement of refiling of petition as required under Section 120.160, R.S.Mo."

Your second question is as follows:

" . . . [D]oes the 1969 amendment [of Section 120.160] requiring a second election to become an established political party affect the status of the American Party even though the statute was enacted after the American Party had become an established party, keeping in mind Section 120.140, after the 1968 general election under the 1953 law [Section 120.160, RSMo 1959]."

Honorable G. William Weier

Your third question is as follows:

". . . [I]f you find that they [the American Party] are an established political party, whether they are established as a State wide political party entitled to file for any office or as a political party depending on the vote in each district or political subdivision and entitled to file for only those offices."

Under Section 120.160, RSMo 1959, which was in effect until October 13, 1969, the American Party qualifies as an "established political party." Section 120.160, RSMo 1959 provided as follows:

"1. Any group of persons hereafter desiring to form a new political party throughout the state, or in any political subdivision greater than a county and less than the state, shall file with the secretary of state a petition, as hereinafter provided, and any group of persons hereafter desiring to form a new political party, in any county shall file such petition with the county clerk; and any group of persons hereafter desiring to form a new political party in any political subdivision less than a county shall file such petition with the clerk or board of election commissioners of such political subdivision, as the case may be. Any such petition for the formation of a new political party throughout the state, or in any district or political subdivision as the case may be, shall declare as concisely as may be the intention of the signers thereof to form a new political party in the state, district or political subdivision; shall state in not more than five words the name of the proposed political party; shall contain a complete list of candidates of all offices to be filled in the state or district or political subdivision, as the case may be, at the next ensuing election then to be held; and, if the new political party shall be formed for the entire state, shall be signed by a number of qualified voters in each of the several congressional districts which shall equal one per cent of the total number of votes cast in such district for governor at the next

preceding gubernatorial election, or by a number of qualified voters in each of one-half of the several congressional districts which shall equal two per cent of the total number of votes cast in such district for governor at the next preceding gubernatorial election. If the new political party shall be formed for any district or political subdivision less than the entire state, the petition shall be signed by qualified voters equaling in number not less than two per cent of the number of voters who voted at the next preceding general election in the district or political subdivision in which such district or political subdivision voted as a unit for the election of officers to serve its respective territorial area.

"2. The filing of such petition shall constitute the political group a new political party, for the purpose only of placing upon the ballot at the next ensuing election the list of party candidates for offices to be voted for throughout the state, or for offices to be voted for in the district or political subdivision less than the state, as the case may be, under the name of, and as candidates of such new political party. If, at the ensuing election, any candidate or candidates of the new political party shall receive more than two per cent of all votes cast at such election in the state, or two per cent of the total vote cast in any district or political subdivision of the state, as the case may be, then such new political party shall become an established political party within the state or within the district or political subdivision, as the case may be, under the provisions of the laws regulating the nominations of established political parties at state primary elections as now, or hereafter may be in force.

"3. Any such petition shall be filed at the same time and shall be subject to the same requirements and provisions that are hereinafter contained in regard to the nomination of any other candidate or candidates by petition."

Honorable G. William Weier

Since in the November, 1968, general election the American Party candidate for President received 11.4% of the total vote cast in the State for President (1969-70 Official Manual, State of Missouri, page 1195), the American Party became an "established political party" under Section 120.160(2) quoted above.

The Seventy-Fifth General Assembly amended Section 120.160 by passage of Senate Bill No. 135 which became effective October 13, 1969. This Section as amended provides in part as follows:

"5. The filing of a valid petition shall constitute the political group a new political party, for the purpose only of placing upon the ballot at the next election the list of party candidates for offices to be voted for throughout the state, or for offices to be voted for in the district or political subdivision less than the state, as the case may be, under the name of, and as candidates of such new political party. If, at the election immediately following the election at which the names of the candidates of the party first appear on the ballot, any candidate or candidates of the new political party shall receive more than two percent of all votes cast at such election in the state, or two percent of the total vote cast in any district or political subdivision of the state, as the case may be, then the new political party shall become an established political party within the state or within the district or political subdivision, as the case may be, under the provisions of the laws regulating the nominations of established political parties at state primary elections as provided by law, except that if in any ensuing election the party fails to have a candidate or fails to receive two percent of the total votes cast at such election in the state, district or political subdivision, as the case may be, the party shall no longer be deemed an established party.

Article I. Section 13, of the Constitution of Missouri, provides:

"That no ex post facto law, nor law impairing the obligation of contracts, or retrospective

Honorable G. William Weier

in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted." (Emphasis added.)

In the case of Lucas v. Murphy, 348 Mo. 1078, 156 S.W.2d 686 (1941), the Supreme Court of Missouri defined retroactive or retrospective laws as "those which take away or impair vested rights acquired under existing laws, or create a new obligation, impose a new duty, or attach a new disability in respect to transactions or considerations already past." (at 690). Moreover, "Statutes will not be held to affect transactions which antedate them, unless the intention of the Legislature for them to retroact is clear, and especially is this the rule when the opposite construction would render a statute unconstitutional and void." Supreme Council of the Royal Arcanum v. Heitzman, 140 Mo. App. 105, 111, 120 S.W. 628 (1909). Later cases hold that a law is said to be "retroactive only when it is applied to rights acquired prior to its enactment." Barbieri v. Morris, 315 S.W.2d 711, 714 (Mo. 1958).

It is clear that amended Section 120.160 acts only prospectively. To hold otherwise would call into question the Constitutionality of this section. Therefore, the pre-existing status of the American Party as an "established political party" under the previous Section 120.160 is not affected by the enactment of Senate Bill 135.

Under Section 120.160, RSMo 1959, once the American Party became established "within the state", persons had a right to file for the next primary election (August, 1970) as candidates for elective office under the designation of the American Party. Had any persons so filed between November 5, 1968, and October 13, 1969, their candidacy for nomination under the American Party designation clearly and unquestionably would be valid. The question arises as to whether the amended Section 120.160 would prevent filing for the August, 1970 primary of candidates under the American Party designation after October 13, 1969.

The established status of the American Party originates from Section 120.160 RSMo 1959. Under that section, the American Party became an "established political party within the state . . . under the provisions of the laws regulating the nominations of established political parties at state primary elections as now, or hereinafter may be in force."

Honorable G. William Weier

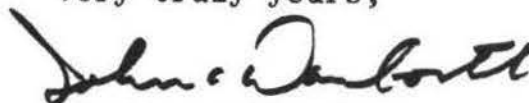
The right of any person to file in the August, 1970, primary as candidate for nomination under the American Party designation became vested as of November 5, 1968, the date on which the American Party obtained its status as an "established political party." To hold otherwise would call into question the constitutionality of amended Section 120.160 under Article I, Section 25 of the Constitution of Missouri guaranteeing the right of every eligible person to become a candidate for an office. Preisler v. City of St. Louis, 322 S.W.2d 748 (Mo. 1959).

CONCLUSION

It is therefore the opinion of this office that the American Party is an established political party in the State of Missouri and all political subdivisions of the State for the purpose of nominating candidates at the August, 1970 primary since said party received more than two percent of the vote cast for president and vice president at the November, 1968 election.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Harvey M. Tettlebaum.

Very truly yours,



JOHN C. DANFORTH
Attorney General

COUNTY TREASURER AND
COLLECTOR:
TOWNSHIP ORGANIZATION:

It is the duty of the county treasurer, ex officio collector, in a county of township organization to collect delinquent personal property taxes under Section 140.730, RSMo 1959.

OPINION NO. 155

March 20, 1970

Honorable Franklin D. Holder
Prosecuting Attorney
Dunklin County Court House
Kennett, Missouri 63857



Dear Mr. Holder:

This is in response to your request for an opinion from this office as follows:

"The Dunklin County Treasurer, ex officio collector, has requested that I obtain an opinion on the following question:

'In counties where township organizations exist, such as Dunklin County, does the County Treasurer, ex officio collector, have the duty under Revised Statute 140.730, to collect or attempt to collect delinquent personal taxes, in relation to Sections 139.320, 350, 360 and 370.'"

Dunklin County is under township organization.

Section 139.420 RSMo requires the township collector on the first Monday of March of each year to make settlement of his accounts with the county court, for state, county, school and township taxes and pay over to the county treasurer, ex officio collector, all the moneys remaining in his hands collected by him on state and county taxes and "make his return of all delinquent or unpaid taxes, as required by law, and make oath before the court that he has exhausted all the remedies required by law for the collection of such taxes".

Honorable Franklin D. Holder

Section 54.280 RSMo 1959 provides:

"The county treasurer of counties having adopted or which may hereafter adopt township organization shall be ex officio collector, and shall have the same power to collect all delinquent personal property taxes, licenses, merchants' taxes, taxes on railroads and other corporations, the delinquent or nonresident lands or town lots, and to prosecute for and make sale thereof, the same that is now or may hereafter be vested in the county collectors under the general laws of this state. The ex officio collector shall, at the time of making his annual settlement in each year, deposit the tax books returned by the township collectors in the office of the county clerk, and within thirty days thereafter the clerk shall make, in a book to be called 'the back tax book,' a correct list, in numerical order, of all tracts of land and town lots which have been returned delinquent by said collectors, and return said list to the ex officio collector, taking his receipt therefor."

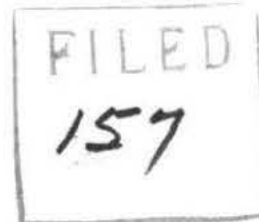
Under this statute, the county treasurer, ex officio collector, in a county under township organization has the same duties and authority for collecting delinquent personal property taxes as a county collector in counties not under township organization.

Sections 140.730 RSMo 1959 to 140.750 provides the method for the collection of delinquent personal taxes by the county collector. The county collector is required to notify the delinquent taxpayer by mail that the taxes assessed against him are due and if not paid within 30 days an act will be brought to collect the same. The provision of this statute authorizes the county collector to sue and recover personal judgment against the taxpayer. It does not authorize the township collector to sue. State ex rel Hibbs. v. McGee 44 S.W.2d 36.

Answer by letter-Wood

February 9, 1970

OPINION LETTER NO. 157



Honorable James A. Noland, Jr.
State Senator - District 33
Osage Beach, Missouri 65065

Dear Senator Noland:

You have asked for my opinion as to the right of the Missouri Legislature to authorize the State Park Board to convey, either in sale or trade, real property constituting the Lake of the Ozarks State Park.

This real property was conveyed by the United States Acting Secretary of the Interior to the State of Missouri by Quit-Claim Deed dated October 10, 1946. The authority for this conveyance was 16 U.S.C.A. §§459r-459t. This Act of Congress required that the conveyance be conditioned on use of the property by the State of Missouri "exclusively for public park, recreational, and conservation purposes," with title and right of possession reverting to the United States upon a finding by the Secretary of the Interior that the State of Missouri had failed to comply with this condition for a period of more than three years (16 U.S.C.A. §459t). In 1950, Congress granted the Secretary of the Interior power to authorize the State of Missouri to "exchange or otherwise dispose" of this real property when to do so would "facilitate the administration" and "consolidate the holdings" of such lands. (16 U.S.C.A. §459u). Before the State of Missouri may so exchange or dispose of any of the lands, the Secretary of the Interior must execute a release upon terms and conditions that will insure use of newly acquired lands for exclusive public park, recreation, and conservation purposes. (16 U.S.C.A. §459u).

Accordingly, it is my opinion that the General Assembly may only authorize the State Park Board to sell or trade lands in the

Honorable James A. Noland , Jr.

Lake of the Ozarks State Park after the release required by Congress has been obtained from the Secretary of the Interior.

Yours very truly,

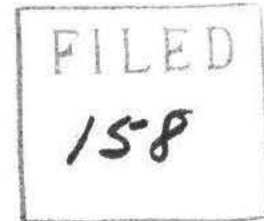
JOHN C. DANFORTH
Attorney General

ANSWER BY LETTER: Sikes

March 27, 1970

OPINION LETTER NO. 158

Ms. Jean Casey
Executive Secretary
Missouri State Board of Cosmetology
1502 West Dunklin Boulevard
Jefferson City, Missouri 65101



Dear Ms. Casey:

This will acknowledge receipt of your opinion request dated January 29, 1970. The issue presented is whether or not the State Board of Cosmetology can require a fifteen dollar fee to retake the state board examination after the person has failed said examination.

Section 329.060 provides in part:

"1. Every person desiring to practice any of the occupations provided for in this chapter shall file with the state board of cosmetology a written application, under oath, on a form prescribed and supplied by the board, and shall submit proof of the required age, educational qualifications, and of good moral character together with a fee of fifteen dollars made payable to the director of revenue."

This subsection provides that every person who files a written application shall tender a fee of fifteen dollars. This subsection does not limit the fifteen dollar fee to a person who is making an initial application. Chapter 329, RSMo makes no reference to a person who has failed the initial examination and who desires to retake the examination. As a consequence, the State Board of Cosmetology can require a person who has failed the examination to refile a written application together with the necessary credentials and a fee in the amount of fifteen dollars.

Ms. Jean Casey

CONCLUSION

It is the opinion of this office that the State Board of Cosmetology can require an additional fifteen dollar fee to re-take the state board examination.

Yours very truly,

JOHN C. DANFORTH
Attorney General

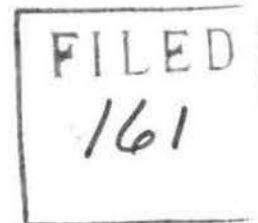
ELECTIONS:
COUNTY CLERK:

1. The county clerk or board of election commissioners shall designate the polling places which will be used for all elections, including school elections, taking place on April 7, 1970. 2. The school board has no power to require that only one of the polling places in the school district designated pursuant to requirements of Section 111.111 will be used for voting on school issues. 3. The county clerk or board of election commissioners shall designate the judges and clerks in each polling place. 4. The judges and clerks designated by the county clerk or board of election commissioners pursuant to paragraph 2 of Section 111.111 shall conduct the election of April 7, 1970 for all subdivisions involved. 5. The school district has no power to designate polling places in the rural areas of the school districts in addition to those designated pursuant to paragraph 1 of Section 111.111.

OPINION NO. 161

March 4, 1970

Honorable Floyd E. Lawson
Prosecuting Attorney
Monroe County Court House
Paris, Missouri 65275



Dear Mr. Lawson:

This letter is in response to your request for the official opinion of this office on a number of questions pertaining to recently enacted election laws. Specifically, your questions were as follows:

"The Superintendent of Schools of the Paris R-II School District has come to me with some questions with regard to a conflict in the general election statutes as set out in Chapter 111, RSMo, 1959, as amended, and Chapter 162, which governs the elections in school districts.

"The Superintendent has these specific questions:

Honorable Floyd E. Lawson

"1. Is it mandatory that the school district designate the City polling places as polling places for the school election?

"2. If the answer to question 1 is affirmative, must the school district provide ballots at each of the City precincts or designate only one of them to vote on school issues?

"3. If the answer to question 1 is affirmative, who selects the judges and clerks?

"4. Assuming the answer to question 1 is affirmative, does the school district provide separate judges and clerks at the voting precincts or does one set of judges and clerks serve in dual capacities for city and school?

"5. May the school district continue to provide polling places in the rural areas of the school district?"

After you wrote your opinion request, the legislature designated April 7, 1970 as the date for a statewide special election on the income tax bill. Therefore, after consulting with you over the telephone, we have taken the liberty of revising, somewhat, your opinion request to make it applicable to this changed situation.

Before answering your questions numbered 1 through 5, we must determine whether the elections to be held on April 7, 1970, are governed by Section 111.111 V.A.M.S. (1969-70 Supp.) or paragraph 1 of Section 162.371 V.A.M.S. (1969-70 Supp.).

Section 111.111 reads as follows:

"1. Notwithstanding any other provisions of law, whenever any general, primary or special election and elections held by a school, fire or sewer district, municipality or other political subdivision are held on the same day, the county clerk, board of election commissioners or other official having authority over general elections, shall designate one polling place for the

Honorable Floyd E. Lawson

several elections in each precinct or district in the political subdivision in which the elections are held.

"2. The county clerk, board of election commissioners or other proper official shall designate the election officials in each polling place who shall conduct the election for all subdivisions involved.

"3. Any person failing or refusing to comply with the provisions of this section is guilty of a misdemeanor."

Paragraph 1 of Section 162.371 provides:

"All elections in six-director districts shall be by ballot, except that the board may direct the use of voting machines in any or all precincts at an election when the machines are available. Convenient polling places within the district shall be designated by the board for all elections. If there is more than one incorporated city or town within the school district, there shall be at least one polling place in each city or town. When a district includes any city, incorporated town or other political subdivision which holds an election on the same day on which the school election is held, the county clerk, board of election commissioners or other official having authority over general elections in the city, town, political subdivision and school district shall, whenever feasible, designate one polling place for both the school district and the city, town or political subdivision election in each precinct or district within the city, town or political subdivision and shall designate the election officials in each precinct who shall conduct the election for all subdivisions involved. The board of education shall designate

Honorable Floyd E. Lawson

polling places for voters who reside outside the corporate limits of cities, towns or other political subdivisions which hold elections at the same time as school elections."

Section 111.111 is specifically applicable to the situation where a statewide special election and elections held by other political subdivisions are being held on the same day. On the other hand, paragraph 1 of Section 162.371 applies when a school district holds its election on the same day as general elections in the city, town or other political subdivision included within the school district. It is the opinion of this office that Section 111.111 is by its terms the statute which pertains to the situation which exists on April 7, 1970 i.e. where a special statewide election is being held at the same time as elections in local political subdivisions. Where applicable to an election situation, Section 111.111 must apply "[n]otwithstanding any other provisions of law" Therefore, we conclude that where the provisions of Section 162.371 conflict with Section 111.111, the latter section controls on April 7, 1970.

Having determined that Section 111.111 is the controlling statute for the election on April 7, 1970, we now turn to the five questions about which you inquire.

1.

When Section 111.111 applies, "the county clerk, board of election commissioners or other official having authority over general elections shall designate one polling place for the several elections. . . ." Based on this language, we conclude that the official in your county having authority over general elections is required by this statute to designate the polling places which will be used jointly by all political subdivisions holding elections on April 7, 1970.

2.

We interpret this question to be whether, after the proper official has designated the polling places, the school district can then designate only one of these polling places within the confines of the school district as the place at which school issues will be voted upon. We see no justification for such an interpretation of Section 111.111. We believe that the primary objective of the legislature in enacting Section 111.111 was to prevent a voter from having to go to a number of polling places on election day to vote on all of the propositions presented by the state and political subdivisions in which he lives. To achieve this purpose, the legislature has

Honorable Floyd E. Lawson

directed that a voter need only go to one polling place to cast all ballots to which he is entitled. To permit a school district to designate as polling places for school matters only certain of the polling places chosen by the official having authority over general elections would, in the opinion of this office, be contrary to the intention of Section 111.111. The authority granted to the school board in Section 162.371 to choose polling places for school elections conflicts with the terms of Section 111.111. As previously demonstrated, Section 111.111 controls the situation on April 7, 1970. Therefore, we conclude a school board may not designate as polling places for the school election to be held on April 7, 1970, only certain of the polling places designated in the school district by the proper official under Section 111.111.

3.

Paragraph 2 of Section 111.111 grants to the "county clerk, board of election commissioners or other proper official" the power to designate the election officials in each polling place "who shall conduct the election for all subdivisions involved". Therefore, the official designated under Section 111.111 should select the judges and clerks for each polling place designated by him.

4.

Paragraph 2 of Section 111.111 provides that the election officials appointed by the official having authority over general elections, "shall conduct the election for all subdivisions involved". Therefore, it is the opinion of this office that the election officials appointed by the county clerk, board of election commissioners or other proper official shall conduct the election for all subdivisions holding elections on April 7, 1970.

5.

Section 111.111 provides that the county clerk, board of election commissioners or other official having authority over general elections shall designate one polling place for the several elections in "each precinct or district in the political subdivision in which the elections are held". Therefore, we believe that it is the duty of the officials named in the first paragraph of Section 111.111 to comply with this direction and that the school district has no authority to designate additional polling places.

Honorable Floyd E. Lawson

CONCLUSION

It is the conclusion of this office that the election to be held on April 7, 1970, is governed by the provisions of Section 111.111 V.A.M.S. (1969-70 Supp.) rather than the provisions of Section 162.371 V.A.M.S. (1969-70 Supp.) insofar as these sections conflict.

Furthermore, it is the opinion of this office that pursuant to the requirements of Section 111.111:

1. The county clerk or board of election commissioners shall designate the polling places which will be used for all elections, including school elections, taking place on April 7, 1970.

2. The school board has no power to require that only one of the polling places in the school district designated pursuant to requirements of Section 111.111 will be used for voting on school issues.

3. The county clerk or board of election commissioners shall designate the judges and clerks in each polling place.

4. The judges and clerks designated by the county clerk or board of election commissioners pursuant to paragraph 2 of Section 111.111 shall conduct the election on April 7, 1970 for all subdivisions involved.

5. The school district has no power to designate polling places in the rural areas of the school district in addition to those designated pursuant to paragraph 1 of section 111.111.

The foregoing opinion, which I hereby approve, was prepared by my assistant, D. Brook Bartlett.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Answer by letter-Wieler

February 9, 1970

OPINION LETTER NO. 162

Mr. Gene Sally, Director
Department of Community Affairs
Jefferson State Office Building
Jefferson City, Missouri 65101



Dear Mr. Sally:

This is in response to your request for a supplement to Opinion Letter No. 512, written to you on December 19, 1969, in which this office expressed the opinion that a municipal housing authority, organized under the provisions of Chapter 99 of the Revised Statutes of Missouri, is included under the provisions of House Bill No. 2 of the First Extraordinary Session of the 75th General Assembly and that bonds issued by said authority may be sold at not less than ninety-five percent of par and may bear interest at a rate not exceeding eight percent if sold at public sale pursuant to the notice qualifications of Section 99.150, subsection 2, RSMo 1959.

In your latest letter, you raise the following questions:

- "1. 'May a municipal housing authority sell bonds to the Federal Government at private sale at a rate in excess of 6% but less than 8% under the provisions of Section 99.150 (2), RSMo 1959 since said housing authorities are given broad powers under Section 99.210, RSMo 1959 to secure federal assistance?'
- "2. 'Are land clearance for redevelopment authorities, organized under the provisions of Section 99.300 to 99.660, RSMo 1959, included under the provisions of House Bill No. 2, First Extraordinary Session of the Seventy-fifth General Assembly?'"

Mr. Gene Sally

With respect to your first question, it is our opinion that a municipal housing authority cannot sell bonds to the federal government at private sale at a rate in excess of six percent but less than eight percent. Although Section 99.210, RSMo 1959, generally provides that a municipal authority may do any and all things necessary or desirable to secure the financial aid or cooperation of the federal government in the undertaking, construction, maintenance or operation of any housing project by such authority, this does not supersede or take precedence over Section 99.150, RSMo 1959, which specifically deals with the bonds of a municipal housing authority and the interest rates thereon. Prior to the passage of House Bill No. 2, Section 99.150 provided that municipal housing authority bonds could not bear interest at a rate exceeding six percent. As noted in Opinion Letter No. 512, Section 99.150, RSMo 1959, was repealed to the extent that it was in conflict with House Bill No. 2 with respect to the interest rate on municipal housing authority bonds. House Bill No. 2 clearly requires that bonds bearing an interest rate in excess of six percent must be sold at public sale after giving reasonable notice of such sale.

With respect to your second question, it is our opinion that land clearance for redevelopment authorities, organized under the provisions of Section 99.300 to 99.660, RSMo 1959, are included under the provisions of House Bill No. 2, First Extraordinary Session of the 75th General Assembly. The reasoning used to determine that municipal housing authorities are included under the provisions of House Bill No. 2 in Opinion Letter No. 512 is sufficient to govern this matter by analogy. Section 99.420, RSMo 1959, provides that a land clearance for redevelopment authority shall "... constitute a public body corporate and politic, exercising public and essential governmental functions, and having all the powers necessary or convenient to carry out and effectuate the purposes and provisions of this law, . . ." This comes within the meaning of the terms "municipality, political subdivision or district of this state" as used in House Bill No. 2, and, therefore, it is our view that House Bill No. 2 was meant to apply to land clearance for redevelopment authorities as well as the other political subdivisions listed in the body of said bill.

Also, using the same reasoning that we used in Opinion Letter No. 512, it is our opinion that Section 99.490, RSMo 1959, was repealed by implication to the extent that the provisions thereof are inconsistent with the provisions of House Bill No. 2. Therefore, it is our view that a land clearance for redevelopment authority organized under the provisions of Chapter 99 of the Revised Statutes of Missouri, is included under the provisions of House Bill No. 2 of the First Extraordinary Session of the 75th General Assembly and bonds issued by said authority may be sold at not less than ninety-five percent of par and may bear interest at a rate not exceeding

Mr. Gene Sally

eight percent if sold at public sale pursuant to the notice qualification of Section 99.490, RSMo 1959.

Yours very truly,

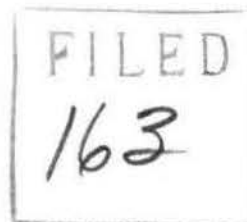
JOHN C. DANFORTH
Attorney General

TAXATION (CITIES,
TOWNS & VILLAGES):
TAXATION (SALES):

The sales tax returns made to the state director of revenue for city sales taxes are confidential and not open to public inspection.

OPINION NO. 163

March 18, 1970



Mr. James E. Schaffner
Director of Revenue
Department of Revenue
Jefferson Building
Jefferson City, Missouri 65101

Dear Mr. Schaffner:

This is in response to your request for an opinion from this office as follows:

"On page seven of the above Bill, line 13, it states that the records shall be open to the inspection of officers of the city and public. Is this in conflict with the provisions contained in Section 144.010 to 144.510 RSMo covering state sales tax?

"Page six of this Bill, line four, states that all applicable provisions contained in Sections 144.010 to 144.510 RSMo, governing the state sales tax, shall apply to the collection of the tax imposed by this act, except as modified in this act.

"It is a known fact that the state sales tax records as maintained by this Department are confidential, and as mentioned above, this Bill indicates that the records for city sales tax would be open to inspection.

"If, in fact, the city sales tax records should become open to the public, this

Mr. James E. Schaffner

then would take away the confidential aspect of the state records, because the reporting on sales, etc. would have to be similar."

The House Bill to which you refer is House Committee Substitute for House Bill No. 243 enacted by the Seventh-fifth General Assembly and is known as the "City Sales Tax Act". In substance, it provides for any incorporated city, town or village in this state to impose a city sales tax after the approval by the voters and under the conditions and provisions as provided for in this bill.

Section 4 of Bill 243 makes it the duty of the director of revenue to administer the act and collect the tax due thereunder. It further provides that the tax imposed and the tax imposed under the state sales tax law shall be collected together and reported upon such forms and under such administrative rules and regulations as may be prescribed by the director of revenue.

Section 5.1 of the above bill provides that all provisions contained in Section 144.010 to 144.510 RSMo governing the sales tax shall apply to the collection of the tax imposed under this bill.

Section 144.120 RSMo which applies to state sales tax makes it unlawful for any person or officer to divulge or give out to any person any information relative to the contents of any return or permit any person not connected with his office to inspect the same, or for the director of revenue, his deputy, agent or clerk to permit the the inspection or to use the same in any way other than making the assessment of the state sales tax.

The above statute makes the state sales tax returns confidential.

Section 6.1 of House Bill 243 provides that all city sales taxes collected by the director of revenue, on behalf of any city, less 2% with cost of collection, shall be deposited by the director of revenue in a special trust fund is to be known as the "City Sales Tax Trust Fund", it further provides:

". . .The director of revenue shall keep accurate records of the amount of money in the trust fund which was collected in each city imposing a city sales tax, and the records shall be open to the inspection of officers of the city and the public."

Mr. James E. Schaffner

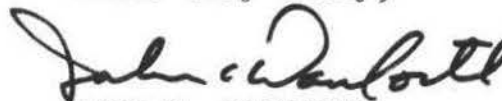
It is our view that under the above provision of House Bill 243 the only records open to inspection of officers of the city and the public is the record kept by the director of revenue of the amount of money in the trust fund belonging to the city imposing the sales tax and that the sales tax returns are confidential as provided for under Section 144.120 RSMo.

CONCLUSION

It is the opinion of this office, that the sales tax returns made to the state director of revenue for city sales taxes are confidential and not open to public inspection.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

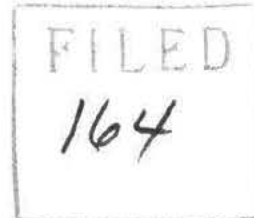
JOHN C. DANFORTH
Attorney General

March 17, 1970

OPINION LETTER NO. 164

(Answered by letter-Nowotny)

Honorable William C. Phelps
State Representative
4th District
5016 Grand
Kansas City, Missouri 64112



Dear Mr. Phelps:

This is in reply to your request for an official opinion of this office, which request reads as follows:

"During the regular session of the 75th General Assembly of the State of Missouri, there was enacted House Bill No. 537 which repealed section 144.080, RSMo. Supp. 1967 and section 144.655, RSMo.1959, relating to the sales tax and use tax and in lieu thereof, provided two new sections to be effective January 1, 1970.

"Section 144.080, RSMo. Supp. 1967, which related to the collection of sales tax and requires the seller by the thirtieth day of the month following each calendar quarterly period to make return of and remit his sales tax liability to the director of revenue, was expanded to provide:

"1. Where his aggregate sales tax liability exceeds \$250 for either the first or second month of a calendar quarter, the seller must pay his aggregate sales tax liability for each such month by the fifteenth day of the succeeding month; and that such monthly payments be allowed as a credit against the seller's aggregate tax liability shown on his quarterly return (Section 144.080-2, RSMo. Supp. 1969);

Honorable William C. Phelps

"2. Where his aggregate sales tax liability is less than \$45 for a calendar quarter, the seller shall be permitted to file a calendar year return and pay his aggregate annual sales tax liability by January 31st of the succeeding year (Section 144.080-3, RSMo. Supp. 1969).

"Similar use tax revisions were added to Section 144.655, RSMo. 1959 requiring monthly payment of use tax liability when exceeding \$250 for either the first or second months of the calendar quarter period and permitting these monthly payments as a credit against the vendor's aggregate use tax liability shown on his quarterly return by the fifteenth day of the month following the calendar quarter period (Section 144.655-2, RSMo. Supp. 1969). Also, where his aggregate use tax liability is less than \$45 a calendar quarter, it was provided that the vendor shall be permitted to file a calendar year return and pay his aggregate annual use tax liability by January 31st of the succeeding year (Section 144.655-3, RSMo. Supp. 1969).

"Instead of prescribing a form of tax deposit for making monthly sales or use tax payments required by House Bill No. 537, which would be allowed as a credit against the aggregate tax liability reportable for the calendar quarter period, the acting Director of Revenue has advised payors of substantial sales and use tax that their tax accounts have been placed on a monthly remittance and reporting basis which basis requires monthly returns with tax remittance to be filed by the fifteenth day of the following month. To require these monthly returns, the Director in his attached notification cites the authority provided him by Section 144.090, RSMo. Supp. 1963, but ignores subsection 2 thereof which provides where monthly tax payments are required by him that ' . . . such (sales tax) payments shall be made on or before the thirtieth day of each month following the period in which the tax is required to be collected.'; the same power to require monthly returns and remittance of the use tax is provided the Director by Section 144.660, RSMo. 1959.

"Since House Bill No. 537 did not abolish calendar quarter reporting of sales and use tax liability, may the Director of Revenue use the authority of Section 144.090, RSMo. Supp. 1963 to require monthly returns of sales-use tax liability with

Honorable William C. Phelps

monthly payments at any time other than the thirtieth day of each month following the period in which the tax is required to be collected?

"The opinion of your office on this procedural matter will be appreciated."

Section 144.080, V.A.M.S., as currently amended, applies to the Missouri Sales Tax and reads in part as follows:

"1. Every person receiving any payment or consideration upon the sale of property or rendering of service, subject to the tax imposed by the provisions of sections 144.010 to 144.510, is exercising the taxable privilege of selling the property or rendering the service at retail and is subject to the tax levied in section 144.020. He shall be responsible not only for the collection of the amount of the tax imposed on the sale or service to the extent possible under the provisions of section 144.285, but shall, on or before the thirtieth day of the month following each calendar quarterly period of three months, make a return to the director of revenue showing his gross receipts and the amount of tax levied in section 144.020 for the preceding quarter, and shall remit to the director of revenue, with the return, the taxes levied in section 144.020.

"2. Where the aggregate amount levied and imposed upon a seller by section 144.020 is in excess of two hundred and fifty dollars for either the first or second month of a calendar quarter, the seller shall pay such aggregate amount for such months to the director of revenue by the fifteenth day of the succeeding month. The amount so paid shall be allowed as a credit against the liability shown on the seller's quarterly return required by this section.

"3. Where the aggregate amount levied and imposed upon a seller by section 144.020 is less than forty-five dollars in a calendar quarter, the director of revenue shall by regulation permit the seller to file a return for a calendar year. The return shall be filed and the taxes paid on or before January thirty-first of the succeeding year."

Honorable William C. Phelps

Section 144.655, V.A.M.S., as currently amended, applies to the Missouri Use Tax and reads in part as follows:

"1. Every vendor, on or before the fifteenth day of the month following each calendar quarter, shall file with the director of revenue a return of all taxes collected for the preceding quarter in the form prescribed by the director of revenue, showing the total sales price of the tangible personal property sold by the vendor, the storage, use or consumption of which is subject to the tax levied by this law, and other information the director of revenue deems necessary. The return shall be accompanied by a remittance of the amount of the tax required to be collected by the vendor during the period covered by the return. Returns shall be signed by the vendor or his authorized agent.

"2. Where the aggregate amount of tax required to be collected by a vendor is in excess of two hundred and fifty dollars for either the first or second month of a calendar quarter, the vendor shall pay such aggregate amount for such months to the director of revenue by the fifteenth day of the succeeding month. The amount so paid shall be allowed as a credit against the liability shown on the vendor's quarterly return required by this section.

"3. Where the aggregate amount of tax required to be collected by a vendor is less than forty-five dollars in a calendar quarter, the director of revenue shall by regulation permit the vendor to file a return for a calendar year. The return shall be filed and the taxes paid on or before January thirty-first of the succeeding year."

Thus, the general statutory scheme is that sales and use tax reports and returns shall be made on a calendar quarterly basis, to be filed on or before the fifteenth day of the month following each calendar quarter. However, depending on certain amounts, return must be made prior to the end of the quarterly period, or can be made on a calendar year basis.

Section 144.090, RSMo Supp. 1967, authorizes the Director of Revenue to require returns other than on a quarterly basis as follows:

"1. The director of revenue, if deemed necessary in order to insure payment to or facilitate the collection by the state of the amount of taxes, or if the revenue needs of the state demand it, may require returns and payment of the amount of

Honorable William C. Phelps

taxes for monthly or annual periods instead of calendar quarters.

"2. In all cases where monthly or annual payments are required by the director of revenue, such payments shall be made on or before the thirtieth day of each month following the period in which the tax is required to be collected."

It is our opinion that the amendments to Section 144.080 and Section 144.655 do not alter or restrict the authority granted under Section 144.090.

Therefore, the Director of Revenue can require monthly or yearly returns for sales and use taxes under the provisions of Section 144.090. When the Director so requires monthly or yearly returns pursuant to this section the taxpayer has until the thirtieth day of each month following the monthly or annual period to remit payments.

When the Director of Revenue has not invoked the provisions of Section 144.090, then the provisions of Section 144.080 and Section 144.655 shall apply.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Answered by Letter
Klaffenbach

March 25, 1970

OPINION LETTER NO. 167

Honorable David N. Lawson
Prosecuting Attorney
Webster County Courthouse
Marshfield, Missouri 65706



Dear Mr. Lawson:

This letter is in response to your opinion request which is stated as follows:

"Over five years ago a county library district was established in Webster County under the provisions of Section 182.010, RSMo. Now a petition has been properly submitted asking for a reconsideration of the tax in accordance with Section 182.020, paragraph 3.

"Must the election on the proposition to reconsider the tax be held at the same time as the annual school election? May it be held at a special election coinciding with the primary or general election?

"Also, we have residents of this county that belong to School Districts in neighboring counties and who vote in those adjoining counties at the annual school elections. If the election must be held at the same time as the annual school election, how should this problem of residents of this county voting on a measure for this county in another county be handled?"

We note that you refer specifically to Section 182.020, RSMo 1959, and a "reconsideration" of the tax. That is, of course, different than a proposed increase under the provisions of Section 182.010 as amended by the 75th General Assembly.

Honorable David N. Lawson

Paragraph 3 of Section 182.020 provides:

"3. The tax may be reconsidered whenever the qualified electors of any county library district shall so determine by a majority vote given at any annual election held there-in on such propositions after petition, order of the court, and notice of the election and of the purpose thereof, first having been made, filed, and given, as in the case of establishing such county library district. At least five years must elapse after the county library district has been established and a tax therefor has been levied before an election may be held on a proposition to reconsider the tax." (Emphasis added)

With respect to your first question concerning whether the election must be held at the annual school election, it is our view that the legislature in stating "at any annual election" in Paragraph 3 of Section 182.020 means at any annual school election. In reaching this conclusion, we note that Section 182.010 specifically refers to the annual school election although it provides for an alternative special election. No such alternative is provided in Section 182.020, and we are of the view that a special election could not be held under Section 182.020 in the absence of specific authority.

With respect to the second question that you pose concerning the place of voting, the procedure prescribed by Section 182.010, as amended by the Laws of 1969, House Bill 670, sets forth the procedure to be followed. That is, the clerk of the county court shall furnish ballots, poll books and other necessary election items to the various school boards conducting the annual school elections as provided in Section 179.020, RSMo 1967 Supp. The annual election referred to in Section 179.020 is the annual school meeting, and it is to be conducted as is the election for the county superintendent of schools. In this respect, we refer you to our Opinion No. 83, dated March 10, 1948, to John W. Smith (copy enclosed).

Section 179.020 requires that the clerk of the county court cause to be delivered to the president or clerk of the school boards of the various districts of the county a sufficient number of ballots for the voters of the district and a tally sheet of sufficient size to contain the names of all the voters of the district. It also requires that the tally sheets so far as practicable shall conform to the form of poll book set out in Section 111.510, RSMo 1959, relating to the general elections. In this respect, we

Honorable David N. Lawson

note that Section 111.510, RSMo 1959, has been repealed and a new section enacted in lieu thereof being designated as Section 111.521 as contained and added by the Laws of 1969, Senate Bill No. 134. Section 179.020 also states that in case a school district is divided by a county line the county clerk shall transmit to the president or clerk of the school board of the district two sets of tally sheets and the voters residing on each side of the line shall vote separately and returns shall be made to each county.

In our Opinion No. 49, dated March 21, 1955, to John C. Kibbe, we held that:

"Under this section the county clerk is to deliver to the president or clerk of the board of education a tally sheet of sufficient size to contain the names of all the qualified voters of the district. In case the district is divided by a county line, he is to transmit two sets of tally sheets to the president or clerk of the board because there will be voters from each county voting on the county superintendent of their respective counties.

"In this case, however, the district lies in three counties. Although the situation is not expressly provided for in the statute, the intention obviously is in such a case that three sets of tally sheets be provided so that the voters of the district residing in each county may vote on their respective county superintendents.

"The tally sheets are not sent directly to the polling places, but are delivered to the president or clerk of the board of education, who in turn delivers them to the polling place or places. For that reason it is not necessary that the county clerk be concerned with the amount of tally sheets distributed to each polling place. His duty is to supply sets of tally sheets sufficient in size to contain the names of all the qualified voters of the district. As a practical matter in this case, if more than one polling place is designated by the board of education, three sets of tally sheets for each polling place should be delivered to the president or clerk of the board of education and the board

Honorable David N. Lawson

should indicate to the county clerk the size and number of tally sheets needed."

We have not enclosed a copy of this opinion for the reason that it also concerned interpretation of other school statutes which have since been repealed, redesignated and re-enacted.

In answer to your second question, the voters will vote for the library district reconsideration proposition at the places designated for the voting on propositions at the annual school election. Such election will be conducted in the same manner as the election for a county superintendent of schools pursuant to the provisions of Section 179.020.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enc: Opinion No. 83, Smith, 3/19/48

RETIREMENT SYSTEM:
PENSIONS:
STATE EMPLOYEES
RETIREMENT SYSTEM:

The Missouri State Employees' Retirement System is not compelled to comply with the provisions of a power of attorney executed by one of its members to a credit union or any other

lending institution for the purpose of securing a loan made by said member and should not accept the tender of the instrument by a member or the lending institution.

OPINION NO. 169

October 1, 1970



Mr. Edwin M. Bode, Secretary
Missouri State Employees'
Retirement System
State Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Bode:

This is to acknowledge receipt of your request for an opinion from this office which reads as follows:

"Is the Missouri State Employees' Retirement System compelled to comply with the provisions of a power of attorney executed by one of its members to a credit union or any other lending institution for the purpose of securing a loan made by said member. The power of attorney provides that the lender can collect the refund of the accumulated contributions of the member in the system as well as to endorse any check issued thereon so that the money will be payable to the lending institution."

In connection with the above, subsection 2 of Section 104.350, RSMo 1969, reads as follows:

Mr. Edwin M. Bode

"2. Upon withdrawal from service, any member who is not entitled to a normal annuity or disability benefits under the provisions hereof, shall receive, upon written application, a refund of the amount of his accumulated contributions to the fund."

In addition, subsection 2 of Section 104.540, RSMo 1969, reads in part as follows:

"2. Any annuity, benefits, funds property, or rights created by, or accruing to, any person under the provisions of sections 104.310 to 104.550, except in those cases where the employer-employee relationship has been terminated for reasons other than retirement, are hereby made and declared exempt from any tax if the state of Missouri or any political subdivision or taxing body thereof, and shall not be subject to execution, garnishment, attachment, writ of sequestration, or any other process or claim whatsoever, and shall be unassignable, . . ."

As a result of the above broad statutory provisions, it is our view that regardless of whether the instrument is a purported "power of attorney" or is in fact an "assignment", the retirement system is not obligated to comply with the provisions of such an instrument executed by one of its members to a lending institution and should not accept the tender of said instrument by the lending institution or the individual member.

Subsection 2 of Section 104.350, supra, expressly provides that the withdrawing employee "shall receive upon written application, a refund. . . ." In addition, subsection 2 of Section 104.540, supra, provides that except in those cases where the employer-employee relationship has been terminated for reasons other than retirement, funds accruing to any person "under the provisions of Sections 104.310 to 104.550," shall not be subject to execution, garnishment, attachment, writ of sequestration or any other process or claim whatsoever and shall be unassignable. . . ." We are therefore persuaded that the intent of the legislature in enacting the above statutes was to secure to the members the exclusive use and benefit of their contributions to the retirement system. There is authority for this proposition in the

Mr. Edwin M. Bode

case of United States v. Hall, 98 U.S. 343, 25 L.Ed. 180 (1879) involving the indictment of a guardian for the embezzlement of his ward's pension money. In this case, the Supreme Court of the United States pointed out that the intent of Congress in passing laws to prevent the diversion of pension money was so that said benefits would inure solely to the use and benefit of those to whom the pensions were granted. The language of the court at page 354 was as follows:

"Enough appears in these references to the legislation of the Congress under the Constitution to show that throughout the entire period since its adoption it has been the unchallenged practice of the Legislative Department of the Government, with the sanction of every President, including the Father of the Country, to pass laws to prevent the diversion of pension money from inuring solely to the use and benefit of those to whom the pensions are granted. With that view, sales, pledges, mortgages, assignments and every other kind of conveyance have been prohibited. Agents employed to collect the money have been required to make oath that they have no interest in such money by any such pledge, mortgage, transfer, agreement or arrangement, and that they know of none, and provision has several times been made for their punishment if they swear falsely."

Finally, in the case of Crowley v. New York State Employees' Retirement System, 296 N.Y.S.2d 616, (1969) it was held that an assignment by a deceased member's first wife to the deceased member's second wife and children of all her rights as the main beneficiary of the deceased member's account with the New York State Employees' Retirement System did not invade the future security or tend to diminish the member's fund during his lifetime. However, the Court also pointed out that it was apparent that the Legislature of the State of New York desired to relieve the Retirement System of the vast administrative work that would be necessary if the state honored executions, garnishments, attachments or any other process including assignments by its members. In addition, the Court pointed out that the legislature by prohibiting assignments sought to protect the member's future security (fund) from being improvidently dissipated by the member or others.

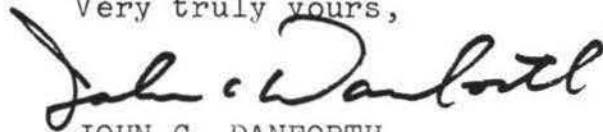
Mr. Edwin M. Bode

CONCLUSION

It is the opinion of this office that the Missouri State Employees' Retirement System is not compelled to comply with the provisions of a power of attorney executed by one of its members to a credit union or any other lending institution for the purpose of securing a loan made by said member and should not accept the tender of the instrument by a member or the lending institution.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, B. J. Jones.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being the most prominent.

JOHN C. DANFORTH
Attorney General

Answer by letter-Gardner

November 18, 1970

OPINION LETTER NO. 170

Mr. Jackson A. Wright
General Counsel
University of Missouri
One Tate Hall
Columbia, Missouri 65201



Dear Mr. Wright:

As you requested, we have reviewed the forms which you submitted entitled, "Anatomical Gift By Next Of Kin Or Other Authorized Person" and "Uniform Donor Card."

Our review leads us to conclude that the forms proposed by the National Conference of Commissioners on Uniform State Laws appear to be better constructed than the forms which you have submitted. Your gift by next of kin form recognizes that a gift can be made prior to the death of the person whose body is to be donated. However, this could be misleading to the uninformed since the gift, as you know, must be "immediately before death" (Section 194.220 (3)). Also your next of kin gift form does not clearly recognize that there are qualifications with respect to gifts to individual donees. For example, a gift to an individual donee who is not a physician or surgeon must be for "therapy or transplantation needed by him" (Section 194.230(4)).

With respect to the uniform donor card which you submitted, we note that the card does not contain a space for the donor to specify a donee. However, the card contains a section for "limitations or special wishes" which possibly might cause the insertion of wishes that could be confused with conditions. The word "limitations" would seem to obligate the recipient of the anatomical gift to follow terms thereafter expressed, while the words "special wishes" would appear to be precatory and therefore not binding on the recipient. When these words are used together, the views expressed thereafter would appear to be quite ambiguous as to whether the recipient would be bound by them or not.

Mr. Jackson A. Wright

Moreover, the uniform donor card which you submitted states that the instrument is "Signed by the donor and the following two witnesses in the presence of each other:". Section 194.240(2) reads, ". . . The document, . . . must be signed by the donor in the presence of two witnesses who must sign the document in his presence or before a notary or other official authorized to administer oaths generally. . . ."

In commenting upon the fine points of the act which are not reflected by either in the next of kin form or the uniform donor card, we recognize that it was deliberately intended that the documents be as brief as possible and, in this respect, obviously every caution must be exercised by anyone relying upon the documents in order that such documents can be interpreted in light of the specific provisions and limitations of the act. Accordingly, while we believe the documents you submitted may be found by the courts to be effective, it is our view that the intention of the legislature with respect to the uniform application of the act could be carried out more effectively if the forms used in Missouri were those proposed by the National Conference of Commissioners on Uniform State Laws.

Yours very truly,

JOHN C. DANFORTH
Attorney General

ELECTIONS:
SPECIAL ELECTIONS:

It is the opinion of this office
that all township and ward com-
mitteemen and committeewomen in
Perry and Ste. Genevieve Counties

are members of the legislative district committee of the 154th legislative district. Such party legislative district committees have authority to make nominations of candidates to run under a party designation at a special election to fill a vacancy in the office of representative from such district caused by the death of the incumbent. Nominations of candidates at such election may also be made by nominating petitions of electors.

OPINION NO. 171

February 10, 1970

Honorable R. J. King, Jr.
State Representative
39th District
1010 Hollingwood
St. Louis, Missouri 63132



Dear Mr. King:

This is in answer to your request for an official opinion as to the procedure to be followed in the selection of candidates for a special election to fill a vacancy presently existing in the 154th State Legislative District.

Such district consists of the counties of Perry and Ste. Genevieve. Appendix B, Chapter 22, RSMo.

We are enclosing a copy of Attorney General's Opinion No. 89, rendered September 6, 1955, to William E. Tipton and Attorney General's Opinion No. 302, rendered July 14, 1965, to Governor Hearnes.

You will note that Opinion No. 302 refers to the fact that Opinion No. 89 was withdrawn by this office but that the holding of Opinion No. 89 is still valid insofar as nomination by political committees is concerned. Both opinions hold that nominations to fill vacancies at special elections for members of the General Assembly can be made both by political committees and by petition.

Subsection 1 of Section 120.750, Senate Bill No. 135, Seventy-Fifth General Assembly provides as follows:

Honorable R. J. King

"The central committee of a political party shall consist of the largest body elected for the purpose of representing and acting for the party in the interim between conventions of the party. That for the purpose of making nominations to fill vacancies resulting from death or resignation and not otherwise on a ticket previously nominated a majority of all the members-elect of a central committee shall be necessary to take action. That a central committee shall not have the power to delegate its authority to make nominations to any person or number of persons, and that any act consequent upon any such delegation of authority shall be held to be null and void. That no central committee shall have the power to substitute, to fill any vacancy, the name of any person who is not known to be of the same political belief and party as the person for whom he is substituted."

Such section specifically provides that the central committee of a party, whether it be the county committee, the state committee, a senatorial committee, a judicial committee, a congressional committee, or a legislative district committee, shall have the power to represent and act for political parties between conventions of such parties. Therefore, it is our view that nominations for the special election to fill the vacancy in the 154th legislative district can be made by party legislative district committees and by petitions.

Section 120.810, RSMo., provides in part as follows:

"1. In all counties of this state having more than one legislative district, there shall be elected a chairman and a vice-chairman, one of whom shall be a woman, for each such legislative district, and the county committee and legislative district committees shall each at the same time elect a secretary and a treasurer, one of whom shall be a woman, but who may or may not be members of said committee.

"2. The congressional, senatorial or judicial district committee of a district of which a county having more than one legislative district shall form a part, shall be composed of the county chairmen and vice-chairmen of the several county committees, and the chairman and vice-chairman of each of the several legislative districts."

Honorable R. J. King

We find no statutory provision relating to legislative district committees except in counties containing more than one legislative district as provided for in Section 120.810.

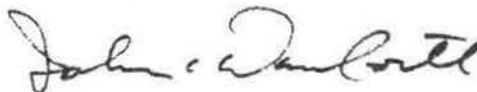
We are enclosing Attorney General's Opinion No. 256, rendered July 27, 1962, to Senator William Baxter Waters. Such opinion holds that in view of the provisions of Sections 120.800 and 120.810 and construing such sections together that the legislative intent is shown to be that members of legislative committees are to be those committeemen and committeewomen from townships or wards or other election districts whose districts are in whole or in part within the legislative district.

Since there is no specific statutory provision as to the composition of legislative district committees when such legislative districts consist of several counties, or a county and part of another county or counties, or several counties and parts of counties, it is our view that the legislative district committees of such districts consist of all committeemen and committeewomen elected from townships, wards, or other election districts in whole or in part in such legislative districts.

CONCLUSION

It is the opinion of this office that all township and ward committeemen and committeewomen in Perry and Ste. Genevieve Counties are members of the legislative district committee of the 154th legislative district. Such party legislative district committees have authority to make nominations of candidates to run under a party designation at a special election to fill a vacancy in the office of representative from such district caused by the death of the incumbent. Nominations of candidates at such election may also be made by nominating petitions of electors.

Very truly yours,



JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 89
9-6-55, Tipton *Withdrawn*

Op. No. 256
7-27-62, Waters

Op. No. 302
7-14-65, Hearnese

SHERIFFS:
CRIMINAL COSTS:
FEES, COMPENSATION
AND SALARIES:

A sheriff's fees computed in accordance with Section 57.290, RSMo 1969, incurred when he apprehends a person, charged with the criminal offense of breaking jail after conviction, and transports that

person from the county of his apprehension to that in which the offense was committed, even though such offense be for breaking jail after conviction, are properly included in those costs which may be taxed against the State pursuant to the provisions of Section 550.020, RSMo 1969.

OPINION NO. 172

September 15, 1970

Honorable James H. Counts
Prosecuting Attorney
Reynolds County
P. O. Box 52
Centerville, Missouri 63633



Dear Mr. Counts:

This official opinion is issued in response to your request for a ruling on the following question:

"X was convicted of a felony in County R, and was sentenced to imprisonment in the county jail. Subsequently, X escaped, but was later apprehended. He was accused of breaking jail after conviction of a felony. X plead (sic) guilty to this offense (a felony) and was sentenced to two years in the penitentiary. X is unable to pay the court costs arising out of the jail break case. The State has refused to pay the costs in the matter, because Section 49.310, Revised Statutes of Missouri, provides that each county erect and maintain a good and sufficient jail."

We have been advised the comptroller pays court costs in a case where the escapee is sentenced to the Department of Corrections for breaking jail if the prisoner is indigent, but does not allow mileage fees for apprehending the prisoner in such a situation. Therefore, we limit our opinion to whether the sheriff's mileage fee incurred when apprehending an escaped prisoner is properly included as court costs and in the event of a felony conviction, chargeable to the State.

Honorable James H. Counts

The circumstances under which the State becomes liable for court costs are set forth in Section 550.020, RSMo 1969, which provides, in part, as follows:

"1. In all capital cases in which the defendant shall be convicted, and in all cases in which the defendant shall be sentenced to imprisonment in the penitentiary, and in cases where such person is convicted of an offense punishable solely by imprisonment in the penitentiary and is sentenced to imprisonment in the county jail, workhouse or reform school because such person is under the age of eighteen years, the state shall pay the costs, if the defendant shall be unable to pay them, except costs incurred on behalf of defendant."

Section 57.290, RSMo 1969, provides, in part, as follows:

"4. The sheriff or other officer who shall take a person, charged with a criminal offense, from the county in which the offender is apprehended to that in which the offense was committed, or who may remove a prisoner from one county to another for any cause authorized by law, or who shall have in custody or under his charge any person undergoing an examination preparatory to his commitment more than one day for transporting, safekeeping and maintaining any such person, shall be allowed by the court, having cognizance of the offense, one dollar and twenty-five cents per day for every day he may have such person under his charge, when the number of days shall exceed one, and seven cents per mile for every mile necessarily traveled in going to and returning from one county to another, and the guard employed, who shall in no event exceed the number allowed the sheriff, marshal or other officer in transporting convicts to the penitentiary, shall be allowed the same compensation as the officer. One dollar and twenty-five cents per day, mileage same as officer, shall be allowed, for board and all other expenses of each prisoner. No compensation shall be allowed under this section for taking the prisoner or prisoners from one place to another in the same county, excepting in counties which have two or more

Honorable James H. Counts

courts with general criminal jurisdiction. In such counties the sheriff shall have the same fees for conveying prisoners from the jail to place of trial as are allowed for conveying prisoners in like cases from one county to another, and the expenses incurred in transporting prisoners from one county to another, occasioned by the insufficiency of the county jail or threatened mob violence, shall be paid by the county in which such case may have originated; provided that the court is held at a place more than five miles from the jail; and no court shall allow the expense of a guard, although it may have actually been incurred, unless from the evidence of disinterested persons it shall be satisfied that a guard was necessary; provided that when the place of conviction is remote from a railroad, upon which a convict may be transported to the penitentiary, the court before which such convict is sentenced may, for good cause shown, allow one guard for every two prisoners, such guard to receive one dollar and fifty cents a day and seven cents a mile for every mile necessarily traveled in going to and returning from the nearest depot on said railroad to the place where such convict was sentenced.

"5. These costs shall be taxed as other costs in criminal procedure immediately after conviction of any defendant in any criminal procedure"

This section specifically provides that a sheriff is to be allowed a fee for taking a person, charged with a criminal offense, from the county in which the offender is apprehended to that in which the offense was committed. The statutory exception is in the event the sheriff transports a prisoner from the jail in one county, to which the prisoner has been removed because of insufficiency of the jail in the county of the trial, to a place of trial in another county, then the fees shall be paid by the county in which the case originated.

Therefore, we conclude that a sheriff's fees computed in accordance with Section 57.290, RSMo 1969, incurred when he apprehends a person, charged with the criminal offense of breaking jail after conviction, and transports that person from the county of his apprehension to that in which the offense was committed, that such fees are

Honorable James H. Counts

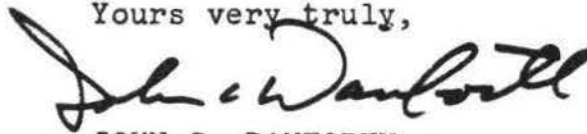
properly included in those costs which may be taxed against the State pursuant to the provisions of Section 550.020, RSMo 1969.

CONCLUSION

A sheriff's fees computed in accordance with Section 57.290, RSMo 1969, incurred when he apprehends a person, charged with the criminal offense of breaking jail after conviction, and transports that person from the county of his apprehension to that in which the offense was committed, even though such offense be for breaking jail after conviction, are properly included in those costs which may be taxed against the State pursuant to the provisions of Section 550.020, RSMo 1969.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Gene E. Voigts.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", with a stylized, flowing script.

JOHN C. DANFORTH
Attorney General

INSURANCE:
DIVIDENDS:

Section 375.380, RSMo 1969, making it unlawful for insurance companies to pay dividends except from surplus profits arising from the business, prohibits the payment of dividends by such companies where there is no earned surplus or undistributed profits.

September 15, 1970

OPINION NO. 173

Mr. William Y. McCaskill
Superintendent
Division of Insurance
Jefferson Building
Jefferson City, Missouri 65101



Dear Mr. McCaskill:

This official opinion is issued in response to the request contained in your letter concerning the legality of paying dividends by a Missouri life insurance company from funds other than earnings from the conduct of its business. More specifically, the question presented is as follows:

"In view of the above circumstances, we request your opinion as to the propriety and the legality of a cash dividend to preferred stockholders in the amount of \$32,000 paid by Continental Security Life Insurance Company during the period January 1, 1969 to June 30, 1969, or at any other time during which the company is operating at an underwriting loss."

Briefly, the facts outlined in your letter may be thus stated:

The Continental Security Life Insurance Company is a life insurance company organized and operating under the laws of Missouri. During the calendar year 1968 the company sustained an underwriting loss of \$232,973.49, and during the period of January 1 to June 30, 1969, the company sustained a further underwriting loss of \$37,197.26. Between December 31, 1968 and June 30, 1969, the company declared and paid a dividend in cash to its preferred stockholders amounting to \$32,000. At the time of payment of the dividend the financial statement of the company disclosed that there was capital paid up of

Mr. William Y. McCaskill

\$263,000, paid-in and contributed surplus of \$1,682,000 less unassigned surplus of (\$1,224,026.28) or remaining total surplus of \$457,973.72, being the difference between the two surplus figures.

The company was organized in 1962, and, according to its annual statements, a net loss from operations was sustained in each year to and including the calendar year 1968 and during the operating period of January 1 to June 30, 1969. At the time of payment of the dividend to preferred stockholders the company did not have a surplus created by earnings or profits from the operation of its insurance business. It is apparent, therefore, that the dividend was paid from "paid-in and contributed surplus" as disclosed in the company's financial statements.

At the outset it should be observed that the State of Missouri has a comprehensive code regulating insurance companies and the insurance business, and any question concerning the operation of a Missouri life insurance company must be considered in the special light of legislation and regulations affecting these companies as distinguished from ordinary business corporations. The purposes and the intent underlying the insurance code have been described by the Supreme Court of Missouri in *State v. Hall*, 330 Mo.1107, 52 S.W.2d 174, where it was said:

"The legislative power to authorize, supervise, regulate, and liquidate insurance companies rests on the interests of the public in the insurance business. It is conceded that the state may through administrative officers supervise and regulate insurance companies in aid of solvency. If so, it has the power to protect those interested, in the event of insolvency. It is a valid exercise of the police power through administrative officers. *State v. Matthews*, 44 Mo.523; *State ex rel. Mackey v. Hyde*, 315 Mo.681, 286 S.W.363, loc.cit.365. The power was first exercised in 1869 by the enactment of an Insurance Code intended to protect policyholders, stockholders, and the public. Laws 1869, p.23. The original Code and amendments thereto indicate an intention to regulate the business from beginning to end, thereby protecting individual and public interests. The enactment of this comprehensive Code made the state a real party in interest. The superintendent of insurance is the administrative officer in charge of that interest, and courts are without authority to interfere with his administration of the Code." (Emphasis supplied)

In referring to the Superintendent of Insurance in relation to his administration of the Insurance Code, Section 374.040, RSMo 1969 states that it shall be his duty:

Mr. William Y. McCaskill

" * * * generally to do and perform with justice and impartiality all such duties as are or may be imposed upon him by the laws regulating the business of insurance in this state and to perform those duties imposed upon him in such a manner as to be in the best interests of and protect the general public, policyholders, insurance companies, and the officers, directors and stockholders thereof; * * * "

Thus, it is apparent that any interpretation of the provisions of the insurance laws must take into consideration the fact that the state and the general public as well as the policyholders and the stockholders have vital interests in the conduct and operation of insurance companies.

Chapter 375, RSMo 1969, sets forth provisions applicable to all insurance companies. Section 375.380 of this chapter states as follows:

"1. It shall not be lawful for the directors, trustees or managers of any insurance company to make any dividend, except from the surplus profits arising from their business, nor for any company to solicit or do new business, when its assets are less than three-fourths of its liabilities."

The language "to make any dividend, except from the surplus profits arising from their business," as used in this statute or language similar thereto has been considered by the courts in several instances. It is apparent that "to make any dividend" is considered as meaning to pay any dividend. *Western & Southern Fire Ins. Co. v. Murphey*, 156 P.885, 56 Okla.702; *Randall v. Bailey*, 23 N.Y.S.2d 173; *People v. San Francisco Savings Union*, 13 P.498, 72 Cal.199; *People ex rel. North American Trust Co. v. Knight*, 89 N.Y.S. 72, 91 App.Div.120.

As to what constitutes "surplus profits" the cases appear to be in conflict. *Randall v. Bailey*, supra, and *Western & Southern Fire Ins. Co. v. Murphey*, supra, indicate that such may be created by the stockholders or from earnings. On the other hand, *People v. San Francisco Savings Union*, supra, and *People ex rel. North American Trust Co. v. Knight*, supra, hold that surplus profits mean an excess of receipts over expenditures arising from the operation of business. We think the better view is represented by the latter authorities as well as those which follow.

The precise question is whether payment of a dividend by the company from its "paid-in and contributed surplus" constitutes payment from "surplus profits arising from their business" within the meaning of the statute. Section 375.380, RSMo 1969.

Mr. William Y. McCaskill

There is a vital difference between "paid-in and contributed surplus" and "surplus profits arising from . . . business". The difference is the same that exists in an ordinary understanding of the matter as well as in the accounting and legal sense between paid-in, surplus or contributed surplus on the one hand, and earned surplus or undistributed profits on the other.

As stated by the court in *Winkelman v. General Motors Corp.*, 44 F.Supp 960,996 (S.D.N.Y.), the surplus account of a corporation represents the net assets in excess of all liabilities, including capital stock. That surplus may be "paid-in surplus" as where the stock is issued at a price above par, it may be "earned surplus" as where it is derived wholly from undistributed profits, or it may, among other things, represent the increase in valuation of land or other assets made upon a revaluation of the corporation's fixed property.

Likewise, in *U.S. v. Zion's Savings & Loan Assn.*, 313 F.2d 331,335, (10th Cir.) the court held that "paid-in surplus" is a surplus which has accumulated by the sale of stock at more than par, and "earned surplus" is the surplus resulting from the profitable operations of the company.

In the case of *In re Lloyd's Estate*, 12 N.Y.S.2d 292,297, 171 Misc.219, it was held that the fund produced by the action of corporate directors in reducing the number of shares of stock so as to create a surplus remains "contributed capital" and constitutes neither "earnings" or "earned surplus" which is the product of earnings, the fruits of contributed capital.

The Supreme Court of Massachusetts in *Commissioner of Corporations & Taxation v. Filoon*, 38 N.E.2d 693,700, 310 Mass.374, held that "accumulated profits" may be described as "earned surplus" or "undivided profits" to distinguish them from "capital" in the broad sense, including "paid-in surplus" or "capital surplus" and they represent property earned by the corporation as distinguished from property invested in the corporation by shareholders, and they may include earnings resulting from capital transactions as well as earnings resulting from ordinary operations of the corporation, and they are in the nature of "income" of such corporation.

The Supreme Court of Missouri in *Leggett v. Missouri State Life Ins. Co.*, 342 S.W.2d 833,899, stated:

" * * * 'The surplus or profits of a mutual life insurance company is the sum remaining out of its gross income after deducting the reserve, dividends, and the losses and expenses; it arises from savings on the assumed rate of mortality, from the excess of interest received over the assumed rate, from the loading for expenses, and the gains from lapsed and surrendered policies; all such items go to make up the surplus, or the so-called net profits of the business, and it is from this source that all

Mr. William Y. McCaskill

so-called dividends and returns to the policyholders, in excess of the face of the policy are made. * * * "

These cases illustrate the distinction between paid-in surplus contributed by the stockholders and surplus earned from operation of the business. Here the surplus was not created by amounts remaining out of the company's gross income because nothing remained, rather an underwriting loss was incurred each year. We are dealing with surplus which was created by money paid in by the stockholders rather than a surplus resulting from the profitable operations of the company.

One of the principal purposes of the insurance laws of Missouri is to give protection to the policyholders and the general public against dilution of the assets of insurance companies by improper distributions of capital (including paid-in surplus) to shareholders.

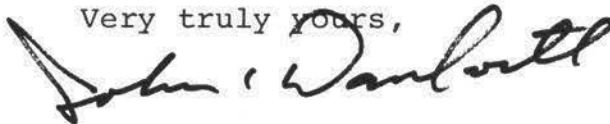
We believe that the fund from which dividends may be paid under Section 375.380, RSMo 1969, must be one earned by the corporation as distinguished from funds invested in the corporation by its stockholders. Accordingly the statute prohibits the payment of dividends under the circumstances involved in the present case.

CONCLUSION

Therefore, it is the opinion of this office that Section 375.380, RSMo 1969, making it unlawful for insurance companies to pay dividends except from surplus profits arising from the business, prohibits the payment of dividends by such companies where there is no earned surplus or undistributed profits.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John E. Park.

Very truly yours,

A handwritten signature in black ink, appearing to read "John C. Danforth", written over the typed name.

JOHN C. DANFORTH
Attorney General

(Answer by Letter) Mansur

March 24, 1970

OPINION LETTER NO. 174

Honorable James L. Paul
Prosecuting Attorney
McDonald County Court House
Pineville, Missouri 64856



Dear Mr. Paul:

This is in answer to your request for an opinion from this office as follows:

"Would you please furnish this office an opinion on the following questions.

"'Are land sites required by the housing authority of local cities under the "HUD" program, subject to taxation.'

"If your answer to the above question is in the negative, then 'are homes which are build on these sites for the low income people and elderly people, which are rented by the local housing authority, subject to assessment and taxation.'"

In answer to your first question, we are enclosing herewith Opinion No. 391 issued by this office on January 23, 1964 to the Honorable Lon J. Levvis, holding property of a municipal housing authority is exempt from ad valorem taxes levied prior to its acquisition. It is our view that property acquired by the municipal

Honorable James L. Paul

housing authority is exempt from ad valorem taxes after it is acquired by the municipal housing authority.

In answer to your second question, we believe the homes built by the housing authority on the land acquired by a municipal housing authority which are rented by the housing authority to low income people and elderly people is likewise exempt from ad valorem taxes.

Bader Realty & Investment Co. v. St. Louis Housing Au. 217 S.W.2d 489 (Mo En Banc 1949).

If you have any further questions, please advise.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure:

Op. 19
1-23-64, Levvis

Answer by letter-Wieler

March 6, 1970

OPINION LETTER NO. 176

Mr. James J. Butler, Chairman
Industrial Commission of Missouri
Post Office Box 599
Jefferson City, Missouri 65101



Dear Mr. Butler:

This is in response to your request for an opinion from this office concerning the applicability of the Prevailing Wage Law, Sections 290.210 to 290.345, RSMo, as amended by Senate Bill No. 142 as enacted in 1969, to public works projects initiated by the University of Missouri and its several divisions.

In Opinion No. 156, issued April 18, 1962, to Mr. June R. Rose and Opinion No. 281, issued August 24, 1962, to Mr. June R. Rose, we held that the Prevailing Wage Law did not apply to the University of Missouri or the Rolla School of Mines, a division of the University of Missouri. You now ask if our holding in these opinions should be revised in view of the latest amendments to Section 290.-210 (6), RSMo. Section 290.210 (6) now reads:

"'Public body' means the state of Missouri or any officer, official, authority, board of commission of the state, or other political subdivision thereof, or any institution supported in whole or in part by public funds;"

However, it is still our view that the Prevailing Wage Law does not apply to the University of Missouri and its several divisions, despite the language of Section 290.210 (6), as amended. Our holding in the earlier opinions revolved around an interpretation of Article IX, Section 9(a) of the Missouri Constitution, which reads as follows:

Mr. James J. Butler

"The government of the State University shall be vested in a board of curators consisting of nine members appointed by the governor, by and with the advice and consent of the senate."

We noted in these opinions that the word "government" as found in the above mentioned constitutional provision has been given a very broad interpretation, both by the courts and in prior Attorney General's opinions. See State ex rel. Heimberger v. Board of Curators of University of Missouri, 268 Mo. 598, 188 S.W. 128, 131 (en banc 1916), which discusses the term "government" as applied to the Board of Curators under the constitution in effect at that time. See also State ex rel. Curators of the University of Missouri v. Neill, 397 S.W.2d 666, 669 (Mo. en banc 1966), which also adopts a broad meaning to the term "government" as applied to the power of the Board of Curators of the University of Missouri to issue revenue bonds to build parking facilities. In addition, enclosed is an opinion issued September 14, 1965, to the Honorable James C. Kirkpatrick, Secretary of State, in which we held that the provisions of House Bill No. 294, 73rd General Assembly, known as the "State Records Act" did not apply to the University of Missouri because of our feeling that this act would interfere with the constitutional power of the Curators to "govern" the affairs of the University.

Since we have been consistently of the view that Article IX, Section 9(a) of the Constitution vests the power to govern the University of Missouri in the Board of Curators thereof and that the legislature is without authority to interfere, and since this was our precise holding in Opinions No. 156 and 281 with respect to the applicability of the Prevailing Wage Law to the University and its divisions, it is our opinion that the Prevailing Wage Law, as amended in 1969, does not apply to the University of Missouri or any of its divisions.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 156
4-18-62, Rose

Op. No. 281
8-24-62, Rose

Op. No. 285
9-14-65, Kirkpatrick

STATE EMPLOYEES:

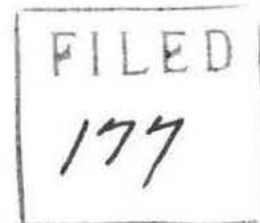
WORKMEN'S COMPENSATION:

A state employee is entitled to elect to receive accrued sick leave pay due him under proper regulations during a period of absence from work for which the employee is otherwise eligible for Workmen's Compensation (Section 287.100, RSMo). For the period such sick leave pay is received, Workmen's Compensation is not due the employee but is due thereafter to the extent that the period of entitlement to Workmen's Compensation exceeds the period for which sick leave pay has been received by the employee. Sick leave pay of a state employee is not to be deducted from Workmen's Compensation due after such sick leave period. If the regulations pertaining to the employee provide that sick leave is not granted for a period of absence attributable to an injury covered by the Workmen's Compensation Law, the employee has no right to elect to receive accrued sick leave pay for such a period of absence. A state employee entitled to elect to receive accrued sick leave during a period of absence in preference to Workmen's Compensation is entitled to receive the medical benefits provided for by Section 287.140, RSMo, during such period.

OPINION NO. 177

October 27, 1970

Mr. Robert L. Hyder, Chief Counsel
Missouri State Highway Commission
Jefferson City, Missouri 65101



Dear Mr. Hyder:

You have requested an opinion on the correct interpretation of the Workmen's Compensation Law from the standpoint of the following questions:

"1. May an employee of the State be paid sick leave (if due him under proper regulations) during a period when such employee is disabled because of an injury in the course of his employment and, if paid such sick leave, is it to be counted against the period of time for which such employee is entitled to Workmen's Compensation benefits?

"2. May an employee receive medical expense and benefits other than compensation payments during a period when he is disabled and entitled to the same but is receiving sick leave under appropriate regulations?"

Mr. Robert L. Hyder

The regulations pertaining to sick leave generally provide that a regular state employee "earns" or is "entitled to" sick leave with full pay at the rate of one and one-fourth (1 1/4) days for each calendar month of service. (Highway Commission Personnel Management Manual, No. 3500, May 1, 1967; Rule 16.4, Personnel Advisory Board Missouri Personnel Division; Undated Memorandum from Office of the Governor, Re: Vacation and Sick Leave). The only apparent statutory reference to sick leave for state employees is with regard to those in the merit system.

" . . . [The advisory board regulations] shall contain provisions for annual leave, sick leave, and special leaves of absence, with or without pay, or with reduced pay, and may allow special extended leaves for employees disabled through injury or illness arising out of their employment, and the accumulation of annual leave and sick leave." (Section 36.350, RSMo)

The Highway Employees' and State Employees' Retirement laws make indirect reference to sick leave by providing that absences for sickness or injury of less than one year may be considered continuous service (Sections 104.050 and 104.350(1), RSMo).

The Workmen's Compensation Law provides:

" . . . Nor shall anything in this chapter be construed as interfering with the right of any public employee to draw full wages, or collect and retain his full fees, so long as he holds his office, appointment or employment, but the period during which the same are received after the injury shall be deducted from the period of compensation payments due hereunder." (Section 287.100, RSMo)

The question then arises: Is a state employee's accrued sick leave embraced within the clause " . . . the right of any public employee to draw full wages, or collect and retain his full fees, so long as he holds his office, appointment or employment, . . ." (Section 287.100, RSMo). We believe that it is.

" . . . Moreover, 'one of the primary objectives in providing pensions for government employees * * * is to induce competent persons to enter and remain in public employment.' . . . And the granting of sick leave with pay is also

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held to be a reasonable means of promoting the efficiency, morale, and general welfare of public employees. . . . Likewise, the granting of holiday and vacation rights (and the enforcement thereof by the courts if such granted rights have been withheld) is a reasonable and proper inducement to competent persons to enter and remain in public employment, to promote their efficiency and morale, and thereby to benefit the public they serve." (Adams v. City of Modesto, 350 P.2d 529, 534 (Cal. 1960))

Although there may be no "legislative action" in this state that has provided for sick leave with pay for state employees, we believe that administrative action has validly done so, and thereby established a "right" which the Workmen's Compensation Law expressly declines to abridge. We are aware that the Personnel Advisory Board and the Highway Commission have adopted regulations that permit their employees to use accrued sick leave only if the particular absence is not caused by an injury arising out of and in the course of state employment. So long as these regulations are in effect, these employees have no "right" to accrued sick leave in the sense used in this opinion; and consequently, if their absences from work are caused by injuries arising out of and in the course of their employment, they are eligible only for Workmen's Compensation.

We do not believe that Section 287.160(3) of the Workmen's Compensation Law can, or should be construed to interfere with a "right" to accrued sick leave. This section provides:

"The employer shall be entitled to credit for wages paid the employee after the injury, and for any sum paid to or for the employee or his dependents on account of the injury, except for liability under section 287.140 [medical, surgical, hospital, nursing, ambulance, and medicine costs]." (Section 287.160(3), RSMo)

In Strohmeyer v. Southwestern Bell Telephone Co., 396 S.W.2d 1 (St.L.Ct.App. 1965), a private employee unsuccessfully resisted the application of Section 287.160(3), RSMo, that allowed his private employer full credit for sums paid the employee during absence following injury pursuant to the private company's disability benefit plan. The employee argued that Section 287.100, RSMo, was unconstitutional if its provisions did not extend to private employees as well as public employees. The Court of Appeals ruled that the legislature could properly differentiate between public and private employments, with the result that a public employee would be disqualified from receiving Workmen's Compensation during the period

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he continued to receive his full salary (Section 287.100, RSMo), whereas, a private employee's Workmen's Compensation would be subject to an employer's credit for all sums previously paid on account of the injury (Section 287.160(3), RSMo).

"The qualification contained in the second sentence of § 287.100, supra, is not a credit provision but is one of disqualification. It imposes a disqualification on the public employee which continues week by week to reduce the obligation to pay any compensation benefits so long as he retains his office and draws his full salary. It should be noted that if this disqualification were to be applied to the claimant in the instant case, nothing would be due him from the employer as he has continued to draw his full salary for a period longer than the twenty-week healing period and the 133 1/3 weeks of permanent partial disability entitlement. It should also be noted that § 287.160, (3), supra, has no provision for disqualification. Doubtless this is for the reason that private employees have no right to continue to hold their employment and draw their full salary during disability. We cannot agree that § 287.100, supra, in any way mitigates the plain and unequivocal wording of § 287.160, (3), supra, providing that the employer is entitled to credit for any sum paid the claimant on account of the injury." (Strohmeyer v. Southwestern Bell, 396 S.W.2d at 7)

The Strohmeyer case suggests without so holding that, just as Section 287.100, RSMo, is not applicable to private employments, Section 287.160(3), RSMo, is not applicable to public employments. In our opinion, such a conclusion must be reached to properly observe the mandate of Section 287.100, RSMo, that no part of the Workmen's Compensation Law shall interfere with a public employee's right to draw full wages after the injury. Payment of accrued sick leave is in our view "draw[ing] full wages." The crediting of sick leave payments against the amount of compensation found to be due under the Workmen's Compensation Law would in most cases reduce the full wages to a lesser payment of Workmen's Compensation for that period. This is what Section 287.100, RSMo, is designed to prevent. Furthermore, the requirement of Section 287.100, RSMo, that the period during which full wages are received after the injury shall be deducted from the period for which Workmen's Compensation is due, cannot in our view be reconciled with the provisions for crediting of wages or sums paid by the employer after, or on account of the

Mr. Robert L. Hyder

injury found in Section 287.160(3), RSMo. We conclude that for public employments, the period of time after injury during which full wages are received must be disregarded as a period of time for which Workmen's Compensation is due, and the credit provisions of Section 287.160(3), RSMo, have no application to such period of time.

We believe that the legislature has through Section 287.100, RSMo, expressed the intention that public employees be entitled to elect to receive their full salary during any period of absence, if authorized by other laws or regulations, and for such time as full salary is received, waive their rights to Workmen's Compensation. So long as a public employee has a right conferred by other laws or regulations to receive his full salary during a period of absence, no provision of the Workmen's Compensation Law or its implementing regulations can disturb that right. If the public employee because he has accrued sick leave receives his full salary during any period of absence, there is no lawful authority for the employer or Workmen's Compensation insurer to make compensation payments to the employee for that period. However, once the period of full salary ends, by virtue of the laws or regulations authorizing it, the public employee is entitled to receive Workmen's Compensation for the remainder of his absence to the extent that the period of disability determined pursuant to the Workmen's Compensation Law exceeds the period of absence following injury for which full salary has been received.

In answer to your second question, it is our opinion that a state employee injured by an accident arising out of and in the course of his employment is entitled to the medical benefits provided by Section 287.140, RSMo, of the Workmen's Compensation Law. We do not believe this entitlement is affected by the fact that the employee may receive accrued sick leave during part or all of the absence following the accident.

The Attorney General's Opinion of May 9, 1958, to Edward E. Haynes holding that sums paid as sick leave to an employee of the penitentiary following an accidental job related injury should be deducted from any sum due the employee pursuant to the Workmen's Compensation Law is hereby withdrawn.

CONCLUSION

It is the opinion of this office that a state employee is entitled to elect to receive accrued sick leave pay due him under proper regulations during a period of absence from work for which the employee is otherwise eligible for Workmen's Compensation (Section 287.100, RSMo). For the period such sick leave pay is received, Workmen's Compensation is not due the employee but is due


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thereafter to the extent that the period of entitlement to Workmen's Compensation exceeds the period for which sick leave pay has been received by the employee. Sick leave pay of a state employee is not to be deducted from Workmen's Compensation due after such sick leave period. If the regulations pertaining to the employee provide that sick leave is not granted for a period of absence attributable to an injury covered by the Workmen's Compensation Law, the employee has no right to elect to receive accrued sick leave pay for such a period of absence.

A state employee entitled to elect to receive accrued sick leave during a period of absence in preference to Workmen's Compensation is entitled to receive the medical benefits provided for by Section 287.140, RSMo, during such period.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Louren R. Wood.

Yours very truly,


JOHN C. DANFORTH
Attorney General

February 16, 1970

OPINION LETTER NO. 178

Honorable Donald J. Gralike
State Representative
49th District
648 Buckley Road
St. Louis, Missouri 63125



Dear Representative Gralike:

This letter is in response to your opinion request in which you inquire concerning the legality of an order issued by the St. Louis County Police Department. You advise that General Order 4-70, Section 2, under the heading of Regulations states that a police officer shall not discharge firearms at a felony suspect unless the crime for which the arrest is sought involved conduct including the use or threatened use of deadly force.

More specifically, you ask whether such order is in violation of Section 544.190, RSMo 1959, or Paragraph 3, Section 559.040, RSMo 1959.

Section 544.190 states in full:

"If, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all necessary means to effect the arrest."

Paragraph 3, Section 559.040 with respect to "justifiable homicide" states:

"When necessarily committed in attempting by lawful ways and means to apprehend any person for any felony committed, or in lawfully suppressing any riot or insurrection, or in lawfully keeping or preserving the peace."

We wish to note at the outset that your question is directed to the validity of the police department regulation; and while it

Honorable Donald J. Gralike

is clear that the governing body of St. Louis County and the governing body of the St. Louis County Police Department could not take it upon themselves to define what constitutes "justifiable homicide" in contravention to Section 559.040 or to grant such officers authority in excess of that authorized by Section 544.190, it is nevertheless clear that the police department does have authority to regulate the conduct of its officers.

That is to say, the St. Louis County Charter which was submitted to the voters and approved on April 2, 1968, provides under Section 4.270 that the Board of Police Commissioners shall be in charge of the Department of Police. Section 4.275 of the Charter provides that the Superintendent of Police shall have supervision, management and control of the operation of the Department of Police and all personnel thereof, and that he is responsible to the Board of Police Commissioners.

We conclude that the St. Louis County Police Department does have authority to issue regulations restricting the use of firearms by the personnel of the department and that such regulations do not conflict with the laws cited or any other laws of this state.

Very truly yours,

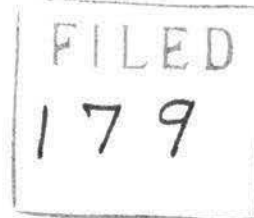
JOHN C. DANFORTH
Attorney General

March 27, 1970

Answer by Letter - Boicourt

OPINION LETTER NO. 179

Honorable Donald L. Gann
State Representative
District 146
P. O. Box 302
Ozark, Missouri 65721



Dear Mr. Gann:

This letter is in response to your request for a ruling of this Office on the following question:

Are the residents of an area annexed to a fourth-class city pursuant to an affirmative vote on such annexation by the inhabitants of said city on November 19, 1968, and a subsequent ordinance annexing such territory on March 3, 1969, subject to city taxes for the year 1969?

The authority by which a fourth-class city can annex territory and the procedures to accomplish such purpose are provided by §79.020 RSMo 1959.

The mayor and board of alderman of such city, whether the same shall have been incorporated before becoming a city of the fourth class or not, with the consent of a majority of the legal voters of such city voting at an election therefor, shall have power to extend the limits of the city over territory adjacent thereto, and to diminish the limits of the city by excluding territory therefrom, and shall, in every case, have power, with the consent of the legal voters as aforesaid, to extend or diminish

Honorable Donald L. Gann

the city limits in such manner as in their judgment and discretion may redound to the benefit of the city; provided, that such election shall be held in accordance with the provision of chapter 111, RSMo 1949, and the same shall be held upon such notice and at such time and place, and the judges and clerks therefor shall be appointed and shall make their returns of the same in such manner as may be prescribed by ordinance or resolution of such city.

We have concluded the annexed area referred to in your opinion request is subject to 1969 city taxes. This result we believe to be valid whether one considers the effective date of annexation to be at the time of the affirmative vote of November 19, 1963, or when the ordinance of acceptance was adopted on March 3, 1969. In regard to the latter possibility, we refer you to Long v. City of Independence, 229 S.W.2d 686 (Mo. 1950). That case, which concerned an annexation to a third-class city, held that a city had the authority to levy taxes on property annexed to said city after January 1 of the tax year but before the official assessment books were completed (loc. cit. 689).

Therefore, in answer to your inquiry, territory annexed to a fourth-class city before the official assessment books for a certain tax year are completed, is subject to city taxes for that year.

Yours very truly,

JOHN C. DANFORTH
Attorney General

March 27, 1970

Answered by Letter - Mansur
OPINION LETTER NO. 184



Honorable Hal E. Hunter, Jr.
Prosecuting Attorney
New Madrid County Court House
New Madrid, Missouri 63869

Dear Mr. Hunter:

This is in response to your request for an opinion from this office as follows:

"The six counties in the Bootheel of Missouri are interested in formulating a multi-county non-profit housing authority to expedite the financing and building of low income housing in the area.

"It has been requested by the county governments that we obtain a ruling on the legality of forming such a multi-county housing authority. Also, we sincerely request the legal ruling on the formulation of a one-county not-for-profit housing authority.

"We are also requesting a ruling on a multi-county and county non-profit corporation for the purpose of building low income housing."

Honorable Hal E. Hunter, Jr.

We assume you refer to the housing authority created under the provisions of Chapter 99 RSMo. Section 99.020 Mo. Supp. 1967 provides that the terms used in Section 99.010 to 99.230 shall have the following meanings:

"(1) 'Authority' or 'housing authority' shall mean any of the municipal corporations created by section 99.040;

"(3) 'County' shall mean any county in the state having a population of four hundred thousand or more;"

Since only St. Louis County and Jackson County have populations of 400,000 or more, Chapter 99 RSMo does not apply to other counties in this state.

If you have any further questions, please advise.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Answer by letter-Wieler

March 6, 1970

OPINION LETTER NO. 186



Mr. Harry Wiggins, Supervisor
Department of Liquor Control
Broadway State Office Building
Jefferson City, Missouri 65101

Dear Mr. Wiggins:

This is in response to your request for an opinion as to the question whether or not it is necessary for the Supervisor of Liquor Control to tender witness fees in advance to persons subpoenaed to testify at hearings within the Supervisor's jurisdiction when such persons reside farther than forty (40) miles from the place of hearing.

Section 311.660, subsection 8, RSMo 1959, provides that the Supervisor has the power:

"To issue subpoenas and all necessary processes and require the production of papers, to administer oaths and to take testimony."

However, Chapter 311 does not contain any specific provisions regarding payment of witnesses who are required to attend hearings before the Supervisor of Liquor Control. Whenever there is not a conflict with a specific provision or provisions contained in Chapter 311, the Administrative Procedure and Review Act (Chapter 536) applies to questions concerning procedure in an administrative hearing before the Supervisor of Liquor Control. See State ex rel. Zimmermann v. Moran, 439 S.W.2d 503, 504 (Mo. 1969).

Section 536.077, RSMo 1959, provides:

". . . The witness shall be entitled to the same fees and, if compelled to travel more than forty miles from his place of residence, shall be entitled to the same tender of fees for travel and

Mr. Harry Wiggins

attendance, and at the same time, as is now or may hereafter be provided for witnesses in civil actions in the circuit court, such fees to be paid by the party or agency subpoenaing him, except where the payment of such fees is otherwise provided for by law. . . ."

Section 491.130, RSMo 1959, provides:

"A witness shall not be compelled to attend, as such, in a civil suit, at a greater distance than forty miles from his place of residence, unless his legal fees for traveling, in going to and returning from the place of trial, and one day's attendance, are paid or tendered to him at the time of summoning such witness."

Therefore, it is our opinion that a witness subpoenaed by the Supervisor of Liquor Control to testify at a hearing before the Supervisor where such hearing is held at a greater distance than forty miles from the witness' place of residence must be tendered his legal fees for traveling to and from the hearing and one day's attendance fee at the time he is summoned.

Yours very truly,

JOHN C. DANFORTH
Attorney General

TAXATION (CITY
SALES TAX):
CITY SALES TAX:

If a sale is made by a retail merchant whose place of business is within the city limits of a city having a city sales tax, and the purchaser takes possession within the State of Missouri, then the city sales tax applies. The manner by which an order is received by a seller is irrelevant for the purposes of the city sales tax, so long as the goods are delivered within the State of Missouri. The sale is deemed to be consummated at the place of business of the seller, and this place of business is the tax situs irrespective of the method of delivery.

July 28, 1970

OPINION NO. 188

Mr. James E. Schaffner, Director
Department of Revenue
Jefferson State Office Building
Jefferson City, Missouri 65101



Dear Mr. Schaffner:

You have recently requested that we advise you with regard to your responsibility with respect to cities sales taxes where the city has adopted a sales tax pursuant to the City Sales Tax Act Sections 94.500 to 94.570, RSMo 1969. Your questions are:

"1. If a non-resident purchaser who makes a purchase but does not take possession of the merchandise purchased within the taxing jurisdiction of a city having a city sales tax and the merchandise must be shipped to the purchaser elsewhere in the state, is the purchaser subject to that city's sales tax?

"2. If the order is placed by phone, mail order, or by an out-of-house salesman, does the city sales tax apply?

"3. If this merchandise is delivered by common carrier or by the vendor's own conveyance to the purchaser in another city having a city sales tax, which city is the tax situs?

Mr. James E. Schaffner

The above questions are answered by Section 94.549(5) which defines place of sale. This section states:

"5. For the purposes of a sales tax imposed by an ordinance pursuant to sections 94.500 to 94.570, all retail sales shall be deemed to be consummated at the place of business of the retailer unless the tangible personal property sold is delivered by the retailer or his agent to an out-of-state destination or to a common carrier for delivery to an out-of-state destination. In the event a retailer has more than one place of business in this state which participates in the sale, the sale shall be deemed to be consummated at the place of business of the retailer where the initial order for the tangible personal property is taken, even though the order must be forwarded elsewhere for acceptance, approval of credit, shipment or billing. A sale by a retailer's employee shall be deemed to be consummated at the place of business from which he works."

In answering such questions as those posed above, it is important to keep in mind the language contained in Section 94.520, to wit:

"The ordinance imposing the city sales tax under the provisions of sections 94.500 to 94.570 shall impose upon all sellers a tax for the privilege of engaging in the business of selling tangible personal property or rendering taxable services at retail. .
."

Section 94.540(5) is consistent with this philosophy of taxation, for it imposes the sales tax only upon those retail sellers who are subject to the city's jurisdiction, i.e., retail sellers who are within the city's jurisdictional limits.

Thus, the answers to your questions are as follows:

1. If a sale is made by a retail merchant whose place of business is within the city limits of a city having a city sales tax, and the purchaser takes possession within the State of Missouri, then the city sales tax applies.

Mr. James E. Schaffner

2. Since for the purpose of the city sales tax act, the sale takes place at the place of business of the seller, the manner by which an order is received by a seller is irrelevant and the tax is imposed so long as the goods are delivered within the State of Missouri.

3. For the purposes of the City Sales Tax Act, the sale is deemed to be consummated at the place of business of the seller, and that is therefore the tax situs. Where the goods are delivered is irrelevant so long as it is in the State of Missouri. Thus, if the sale is made in City A, which has a city sales tax, but delivery is made to the purchaser in City B, which also has a city sales tax, City A's sales tax will apply to the sale. Furthermore, if a sale is made in City A which does not have a city sales tax, yet delivery is made in City B which does have such a tax, City B's sales tax cannot be imposed upon the purchase.

CONCLUSION

It is therefore, our opinion that:

1. If a sale is made by a retail merchant whose place of business is within the city limits of a city having a city sales tax, and the purchaser takes possession within the State of Missouri, then the city sales tax applies.

2. The manner by which an order is received by a seller is irrelevant for the purposes of the city sales tax, so long as the goods are delivered within the State of Missouri.

3. The sale is deemed to be consummated at the place of business of the seller, and this place of business is the tax situs irrespective of the method of delivery.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Craft.

Very truly yours,



JOHN C. DANFORTH
Attorney General

CITIES, TOWNS & VILLAGES:
ZONING:
PLANNING & ZONING:

An interim or temporary ordinance enacted by a fourth class city providing that all territory annexed to the city shall be automatically classified in the single family dwelling district until otherwise classified by ordinance is a valid exercise of police power

OPINION NO. 189

April 7, 1970

Honorable Eric F. Fink
State Representative
District No. 46
1325 Froesel Drive
Ellisville, Missouri



Dear Representative Fink:

This is in response to your request for an official opinion on the question of the validity of an ordinance of a city of the fourth class which provides that all territory which may hereafter be annexed shall be automatically classified in the single family dwelling district unless otherwise classified by ordinance.

The ordinance set forth in your opinion request is as follows:

"1. In any case where property is not specifically within a district shown on the district map, such property shall be considered as being within the R-1 single family dwelling district until or unless otherwise classified by ordinance. All territory which may hereafter be annexed to the city of Ballwin shall be automatically classified in the R-1 single family dwelling district until otherwise classified by ordinance."

Zoning ordinances and building regulations constitute the exercise of a governmental function referable to the police power. State ex rel Sims vs. Eckhardt (Mo.) 322 S.W.2d 903. Section 89.-020, RSMo 1959, empowers:

". . . the legislative body of all cities, towns, and villages . . . to regulate and restrict the height, number of stories, and size of buildings and other structures, the

Honorable Eric F. Fink

percentage of lot that may be occupied, size of yards, courts, and other open spaces, the density of population, the preservation of features of historical significance, and the location and use of buildings, structures and lands for trade, industry, residence or other purposes."

The standards by which this grant of authority is to be exercised are enumerated in Section 89.040 as follows:

"Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers, to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to preserve features of historical significance; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the values of buildings and encouraging the most appropriate use of land throughout such municipality."

The procedure to be followed by the legislative body availing itself in the first instance of the zoning power granted to all cities, towns and villages in first establishing zoning in a municipality are set forth in Section 89.070 as follows:

"In order to avail itself of the powers conferred by sections 89.010 to 89.140, such legislative body shall appoint a commission, to be known as 'The Zoning Commission', to recommend the boundaries of the various original districts and appropriate regulations to be enforced therein. Such commission shall make a preliminary report and hold public hearings thereon before submitting its final report and such legislative body shall not hold its public hearings or take action until it has received the final report of

Honorable Eric F. Fink

such commission. Where a city plan commission already exists, it may be appointed as the zoning commission."

This section is applicable to the establishment of zoning districts and restrictions in newly annexed territory. In *Murrell vs. Wolff* (Mo.) 408 S.W.2d 842, 1.c. 847, the court said:

" . . . Section 89.070 prescribes the procedure to be followed by the legislative body in availing itself in the first instance of the zoning powers granted to all cities, towns, and villages; in first establishing zoning in a municipality. It relates only to the original zoning ordinance fixing the boundaries of the original districts and prescribing the regulations to be followed therein. Logically, the term 'original districts' as used in §89.070 refers to the establishment of zoning districts in areas not previously zoned. . . ."

It appears therefore that a public hearing is necessary for all zoning legislation. That is to say, the persons living in and owning realty in the affected area may not be deprived of their right to have a voice in the zoning of their realty.

The purpose of zoning, as expressed in these statutes, is to limit the rights of a citizen to use his property in order to promote and protect the public health, safety, comfort, morals, and welfare of the people. The theory underlying these statutory provisions is that in order to achieve such results there should be a careful and scientific study made by a competent commission, and that after the commission has reached a conclusion, there should be an opportunity afforded to the public to express their views and make objections, if they have any objections, concerning the proposed enactment so that the legislative body can balance the objections against the advantages and reach a sound final conclusion. As pointed out by the court in the Eckhardt case:

" . . . The statutes contemplate that zoning regulations, restrictions and districts be well planned, and that they be of a more or less permanent nature and subject to change only to meet genuine changes in conditions. . . ." 322 S.W.2d 903 1.c. 907.

It is apparent that the ordinance submitted with your opinion request is an interim ordinance intended as a temporary or emergency

Honorable Eric F. Fink

measure to preserve the status quo of conditions until a premanent ordinance can be passed after the zoning commission has completed its investigation and secured the data and information to be used as a basis of a report to the legislative body looking to the enactment of a permanent zoning ordinance.

It appears therefore that the effect of the interim or temporary ordinance submitted with your letter is to serve notice that the city does not intend to issue any building permits other than those for residential purposes in the newly annexed area until the study is completed and an ordinance permanently zoning the annexed areas has been enacted.

It would be illogical to hold that after the zoning commission had prepared a preliminary report and held public hearings on the proposed ordinance and while the ordinance was under consideration, any person merely by filing an application for a building permit could compel the municipality to issue a permit which would allow him to establish a use which he knew or could have known would be forbidden by the proposed ordinance, and by so doing nullify the entire work of the municipality in endeavoring to carry out the purpose for which the zoning law was enacted. On the other hand, it would seem reasonable to hold that a municipality may refuse a building permit for a land use repugnant to a pending and later enacted zoning ordinance even though application for the permit is made when the intended use conforms to existing regulations. This is in accord with the views expressed by the Kansas City Court of Appeals in the recent case of *Smith v. City of Lee's Summit, Missouri*, No. 25130, filed February 2, 1970. In that case the court stated:

"Plaintiffs next contend that the rezoning here in question was invalid because the city had not adopted an overall zoning plan and classification for the entire annexed area. As authority supporting this contention, plaintiffs rely solely on the decision by our Supreme Court in the case of *State ex rel. Sims v. Eckhardt*, 322 S.W.2d 903. We conclude that the situation here presented is so factually different from that considered in *Eckhardt* that the latter case does not rule the case at bar.

"The overall zoning ordinance of the city of Lee's Summit provides that any land thereafter annexed by the city will automatically come under the provisions of the zoning ordinance and will be classified and used for agricultural purposes until such time as the city has

Honorable Eric F. Fink

an opportunity to study and reclassify such annexed areas. This is obviously an interim classification which is designed to be temporary in nature and contemplates an orderly change in zoning classification as time permits. In the Eckhardt case, supra, the overall zoning ordinance of the city of Columbia did not provide for any such interim zoning classification. Rather, the city passed a zoning ordinance applicable to an annexed area permanently fixing its zoning classification. This was done without the formalities affirmatively required by statute as a condition to original zoning. The Supreme Court in the Eckhardt case held that such permanent zoning of the annexed area could be validly accomplished only by observing and following all of the forms and procedures required by statute for original zoning. The court there expressly declined to rule upon the validity of an interim zoning classification. Likewise, in the case at bar, the plaintiffs do not challenge the legality of the interim zoning classification of the land in question as agricultural. They only challenge the change therefrom by the rezoning ordinance. Consequently, the principles laid down in the Eckhardt case have no applicability to the case at bar. As heretofore stated, it is obvious that the classification of this land as agricultural was strictly temporary. If it were to be permanent there would have been no valid reason for the annexation of such an agricultural area. Both the original zoning ordinance and the annexation of this area contemplated a change in use. This land was annexed on January 1, 1965, and at the time of trial in November of 1967, a land use study by outside 'experts' had not yet been completed and the city had not received final report thereof. Plaintiffs cite no authority requiring us to hold that the zoning of such annexed area cannot be changed for years after the annexation until some overall study is completed. Both the overall zoning ordinance and the action of annexation contemplate change from agricultural use of the land. We cannot hold that the ten year permit for the use of this tract of land as a mobile home park is so arbitrary and unreasonable under all the circumstances shown as to render it invalid. We therefore rule this contention of plaintiffs against them."

Honorable Eric F. Fink

The police power is not something that is rigid and definitely fixed, but in its very nature must be somewhat elastic in order to meet the changing and shifting conditions which from time to time arise through the increase of population and complex commercial and social relations of the people. *Graff v. Priest* (Mo.) 201 S.W.2d 945. The case of *Women's Kansas City St. Andrews Soc. vs. Kansas City, Mo.*, 58 F.2d 593, involved an action brought to restrain the city from enforcing the term of a zoning ordinance to prevent the use of plaintiff's property as a philanthropic old ladies home. The court said:

"Courts have gone far in sustaining the exercise of police power, and there has been a gradual expansion of such power justified by changing conditions. Originally the police power was exercised in the interest of public health, safety, peace, and morals. Then it expanded by including in its province questions of 'general welfare' and regulations designed to promote not only public health, morals, and safety, but regulations to promote 'public convenience' and 'general prosperity.' . . ."
58 F.2d 593 1.c. 599

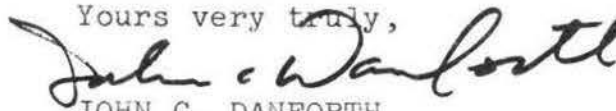
It was necessary and desirable to enact the ordinance described in your opinion request in order to properly provide for the orderly development of the municipality. It is well known that many people in the interim before annexation attempt to establish a use which would not be permitted after the property has been annexed and permanently zoned. The legislative body in this instance only took such steps as would control the area to permit zoning in a lawful and orderly manner if and when the territory were annexed to the city.

CONCLUSION

It is the opinion of this office that an interim or temporary ordinance enacted by a fourth class city providing that all territory annexed to the city shall be automatically classified in the single family dwelling district until otherwise classified by ordinance is a valid exercise of police power.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, L. J. Gardner.

Yours very truly,


JOHN C. DANFORTH
Attorney General

CITIES, TOWNS & VILLAGES:
STATE AUDITOR:
PETITIONS:

The state auditor should not
make an audit of a city in
which a petition has been
presented to him under the

provisions of Section 29.230, RSMo Supp. 1967, such petition purportedly containing enough signatures to authorize him to make an audit of such city, when he also receives sworn statements from individuals who allegedly signed the original petition stating under oath that they did not sign such petition, such withdrawn signatures being of sufficient number to reduce the signatures below the number necessary to authorize the state auditor to make such audit.

March 19, 1970

OPINION NO. 190

Honorable Haskell Holman
State Auditor
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Holman:

This is in reply to your request for an official opinion of this office concerning the question whether the state auditor should make an audit of a city in which a petition has been presented to him purportedly containing enough signatures to authorize him to make an audit of such city when he receives sworn statements from individuals who allegedly signed the original petition stating under oath that they did not sign such petition, such withdrawn signatures being of sufficient number to reduce the signatures below the number necessary to authorize the state auditor to make such audit.

Audits of cities by the state auditor are authorized by subsection 2 of Section 29.230, RSMo Supp. 1967, which reads as follows:

"The state auditor shall audit any political subdivision of the state, including counties having a county auditor, if requested to do so by a petition signed by five per cent of the qualified voters of the political subdivision determined on the basis of the votes cast for the office of governor in the last election held prior to the filing of the petition. The political subdivision shall

Honorable Haskell Holman

pay the actual cost of audit. No political subdivision shall be audited by petition more than once in any one calendar or fiscal year."

The question here, under the facts stated, is whether the state auditor should proceed with the audit in view of the conflicting petitions. That question depends on the nature of the duties of the state auditor under Section 29.230.

It is said in 67 C.J.S., Officers, Section 112:

"A duty is ministerial when it is a simple and definite duty imposed by law, arising under conditions admitted or proved to exist. A duty is discretionary when it requires the exercise of judgment."

In State ex rel. Folkers v. Welsch, 235 Mo.App.15, 124 S.W.2d 636, it was said that a ministerial act as applied to a public officer is an act or thing which he is required to perform by direction or legal authority upon a given state of facts being shown to exist, regardless of his own opinion as to the propriety or impropriety of doing the act in a particular case.

It is our opinion that the duties of the state auditor regarding when he shall audit a political subdivision under Section 29.230 are ministerial. Therefore, when a petition with the required number of signatures is presented to the state auditor he must conduct the audit. See Kaesser v. Becker, 295 Mo.932, 243 S.W.346 and State ex rel. Kemper v. Carter, 257 Mo.52, 165 S.W.773.

The point applicable here from the Kaesser case and the Kemper case is that where there is a prima facie showing of the facts required by the statute upon which the officer is to act, then he must act.

The problem at hand is whether there is prima facie evidence upon which the state auditor must make the requested audit.

The court in the Kaesser case stated, l.c. S.W.350:

"[2] III. Each petition, purporting to be signed by legal voters with addresses of the signers and supported by the statutory affidavit of the circular thereof and filed in the office of the secretary of state, is prima facie proof of the genuineness of such signatures, that the persons whose signatures appear thereon live at the addresses given, and that such persons are legal voters. Section 5907, R.S.1919; State ex rel. v. Carter, 257 Mo.loc.cit.78,165 S.W.773. Such prima facie character of such petitions continues in the suit to enjoin the secretary of state from submitting the act to a referendum, until it is

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overcome by the proof. Prima facie literally means at first view. In *Smith v. Burrus*, 106 loc.cit.100, 16 S.W.882, 13 L.R.A.59,27 Am.St. Rep.329, it is defined as:

'Such evidence as in judgment of law is sufficient to establish the fact, and if not rebutted remains sufficient for the purpose.'

"It is such proof as puts one contending against the truth of such prima facie showing to his own contrary proof, and, in the absence of such contrary proof, is sufficient to establish the fact finally. We quote from *Gilpin v. Railway Co.*, 197 Mo. at page 325, 94 S.W. at page 871 as follows:

'What is a prima facie case? The following answers have been given to that question: "A prima facie case is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced on the other side." 2 Abbott's Law Dic.312. "A prima facie case is that which is received or continues until the contrary is shown." 22 Am.& Eng.Ency.Law (2d Ed.) p.1294. Prima facie evidence. "It is such as, in judgment of law, is sufficient to establish the fact; and, if not rebutted, remains sufficient for the purpose." *Kelly v. Jackson*, 6 Peters, 632.'

"[3] The law presumes right conduct rather than otherwise. It presumes that men will not deliberately commit criminal acts. Applying such presumption concretely, when the circulator of a referendum petition makes the statutory affidavit thereto, the law accepts as true the statements made therein until the contrary is shown. This means that the genuineness of the signatures and the correctness of the addresses given and that the signers are legal voters are sufficiently shown by such affidavit to require the secretary of state to accept and file the petition, and that when any of the facts stated in such affidavit are questioned in court proceedings, those questioning the truth of such statements must produce testimony to overcome such prima facie case. When such proof is offered, it is the duty of the trier of the facts to determine the fact from all the proof, and such fact must be determined like any other issue of fact in a civil case from a fair preponderance of the evidence."

Honorable Haskell Holman

In the instant situation the state auditor has been presented with a petition containing the number of signatures required by statute. On the basis of that petition alone, there would be a prima facie showing requiring the audit.

However, there has been presented to the state auditor an equally valid appearing petition of signatures stating they did not sign the first petition.

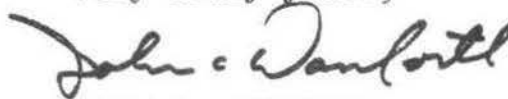
In this situation it is our opinion that there has not been a prima facie showing of the required number of signatures to cause the state auditor to make the audit under Section 29.230, and a court determination is necessary before an audit can be made.

CONCLUSION

It is the opinion of this office that the state auditor should not make an audit of a city in which a petition has been presented to him under the provisions of Section 29.230, RSMo Supp.1967, such petition purportedly containing enough signatures to authorize him to make an audit of such city, when he also receives sworn statements from individuals who allegedly signed the original petition stating under oath that they did not sign such petition, such withdrawn signatures being of sufficient number to reduce the signatures below the number necessary to authorize the state auditor to make such audit.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Walter W. Nowotny, Jr.

Very truly yours,



JOHN C. DANFORTH
Attorney General

ELECTIONS:

1. A county clerk, pursuant to Section 111.111, Senate Bill No. 134, 75th General Assembly, need not designate a polling place in each ward of a 4th class city but must designate a polling place in each precinct or election district in a 4th class city. 2. If a precinct or election district includes part of a school district lying within a city and part outside of the city, a county clerk may designate one polling place in the city within the precinct or election district. 3. The location of a polling place within a precinct or election district is within the discretion of the county clerk. 4. A county clerk pursuant to Section 111.111 is not required to establish a polling place in Ward 1 or Ward 2 of Forsyth but is required to designate a polling place in each precinct or election district in Forsyth. Whether it is necessary to establish another polling place for people living outside of Forsyth but in the Forsyth school district depends on whether these people live in the same precincts and election districts located in Forsyth.

OPINION NO. 192

April 3, 1970

Honorable Peter H. Rea
Prosecuting Attorney
Taney County Court House
Forsyth, Missouri



Dear Mr. Rea:

This letter is in response to your request for the official opinion of this office on a number of questions pertaining to recently enacted election laws. Specifically, your questions were as follows:

"1. Must the County Clerk designate a polling place in each ward of a 4th class city?

"2. Must the County Clerk designate a different place for those people living in the school district outside of the municipal boundaries of the cities in my county where they may vote on the school matters and the referendum?

"3. What discretion does the County Clerk have in designating the polling places?

"4. Is the County Clerk required to establish polling places as follows:

Honorable Peter H. Rea

- A. A polling place for the voters in Ward 1 in Forsyth?
- B. A polling place for voters in Ward 2 of Forsyth?
- C. A polling place, separate from the two above, for the voters who live in the school district and township of Forsyth School, and who live outside the municipal boundaries of Forsyth, so that a third designated polling place would exist for those interested only in school and referendum, and not interested in municipal business?"

In Opinion No. 161 dated March 4, 1970, to the Honorable Floyd E. Lawson, we determined that Section 111.111, V.A.M.S. (1969-70 Cum. Supp.) was specifically applicable to the elections of April 7, 1970. We are enclosing a copy of Opinion No. 161.

1. We have previously determined in Opinion No. 199, dated March 4, 1970, to the Honorable Kenneth R. Babbitt (a copy of which is enclosed), that the county clerk pursuant to the requirements of Section 111.111 need not designate a polling place in each ward of a city but is required to designate a polling place in each precinct or election district within the city.

2. Whether the county clerk must designate a different voting location for those people living in a school district outside of the city boundaries depends on the configuration of the precincts or election districts in your county. If a precinct or election district includes part of a school district lying within a city and part outside of the city, a county clerk could designate one polling place in the city for this precinct or election district.

3. Section 111.111 requires that the county clerk designate ". . . one polling place for the several elections in each precinct or district in the political subdivision in which the elections are held." The location of the polling places is left to the discretion of the county clerk.

4. We have already determined, in response to Question 1, above that the county clerk need not establish a polling place for the voters in each ward of a city but is required by Section 111.111 to designate one polling place for each precinct or election district in Forsyth. Question 4 C is answered by our response to Question 2, above.

CONCLUSION

Therefore, it is the opinion of this office that:

Honorable Peter H. Rea

1. A county clerk, pursuant to Section 111.111, Senate Bill No. 134, 75th General Assembly, need not designate a polling place in each ward of a 4th class city but must designate a polling place in each precinct or election district in a 4th class city.

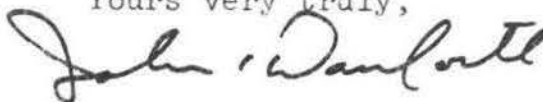
2. If a precinct or election district includes part of a school district lying within a city and part outside of the city, a county clerk may designate one polling place in the city within the precinct or election district.

3. The location of a polling place within a precinct or election district is within the discretion of the county clerk.

4. A county clerk pursuant to Section 111.111 is not required to establish a polling place in Ward 1 or Ward 2 of Forsyth but is required to designate a polling place in each precinct or election district in Forsyth. Whether it is necessary to establish another polling place for people living outside of Forsyth but in the Forsyth school district depends on whether these people live in the same precincts and election districts located in Forsyth.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, D. Brook Bartlett.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 161
3-4-70, Lawson

Op. No. 199
3-4-70, Babbitt

WORKMEN'S COMPENSATION:

No clerical employee of the Division of Workmen's Compensation can be paid more than four hundred fifty dollars (\$450.00) per month. There can be no class of employees in the Division of Workmen's Compensation with any salary rate between four hundred fifty dollars (\$450.00) and eight hundred dollars (\$800.00) per month.

OPINION NO. 194

May 19, 1970



Honorable Donald N. LaTowsky
Acting Director
Division of Workmen's Compensation
Broadway State Office Building
Jefferson City, Missouri 65101

Dear Director LaTowsky:

We have for consideration your request of February 13, 1970, the text of which is as follows:

"Your opinion regarding the interpretation of Section 287.615, RSMo. 1959, is earnestly solicited.

"Section 287.615 provides: 'The division may appoint or employ such other persons as may be necessary to the proper administration of this chapter. The salaries shall be not less than three hundred dollars nor more than four hundred fifty dollars per month for any clerical employee, all salaries to clerical employees within said range shall be fixed by the division and approved by the industrial commission, eight hundred dollars per month to any reporter or other employee and one thousand two hundred dollars per month to any legal advisor. . . .'

"Particular inquiry is made as to the term '. . . or other employee. . . .' It is to be noticed that the section provides 'The salaries shall be not less than three hundred dollars nor more than four hundred fifty dollars per month for any clerical employee, . . . eight hundred dollars per month to any reporter or other employee. . . .' Does this mean that between the statutory four hundred fifty limitation and the eight hundred limitation there exists no salary bracket?

Honorable Donald N. LaTowsky -

"The interpretation of the descriptive words 'other employee' is also desired. Does this section mandatorily state that an employee, having reached the clerical limit of four hundred fifty dollars per month, cannot be advanced in salary until he has reached a proficiency sufficient to entitle him to the eight hundred dollars per month salary mentioned in the Statute?"

A review of Section 287.615, RSMo, as revised in 1959 and as re-enacted and amended in 1961, 1963, 1965 and 1967 is helpful in the interpretation of this section.

As revised in 1959, Section 287.615 stated in part as follows:

"The division may appoint or employ such other persons as may be necessary to the proper administration of this chapter at salaries to be fixed by the division and approved by the industrial commission; provided, however, that such salaries shall in no case exceed the sum of two hundred and fifty dollars per month to any clerical employee, five hundred dollars per month to any reporter or other employee, or seven hundred dollars per month to any referee or legal advisor, except that a referee may be placed in charge of each of the offices of the division in St. Louis, Kansas City and Springfield, and each such referee and any referee in charge of any other branch office of the division may receive a salary of not to exceed seven hundred and fifty dollars per month; . . ." (Emphasis added).

It is noted that the salaries were to be approved by the Industrial Commission and that maximum salaries rather than fixed salaries were shown in the statute.

In 1961, the corresponding part of this section was changed to:

"The division may appoint or employ such other persons as may be necessary to the proper administration of this chapter at salaries to be fixed by the division and approved by the industrial commission; provided however, that such salaries shall in no case exceed the sum of three hundred dollars per month to any clerical employee, five hundred dollars per month

Honorable Donald N. LaTowsky -

to any reporter or other employee, seven hundred dollars per month to any legal advisor. The salary of each referee shall be seven hundred dollars per month, and the salary of each referee in charge of the offices of the division in St. Louis, Kansas City and Springfield, and any branch office of the division shall be seven hundred fifty dollars per month; . . ."

The effect of this revision was to increase the maximum salaries for clerical employees and to establish fixed salaries for referees.

The first sentence of this section was changed in 1963 to read as follows:

"The division may appoint or employ such other persons as may be necessary to the proper administration of this chapter and the salaries shall be not less than three hundred dollars nor more than four hundred dollars per month to any clerical employee, which salaries to clerical employees within said range shall be fixed by the division and approved by the industrial commission, five hundred fifty dollars per month to any reporter or other employee and seven hundred dollars per month to any legal advisor. . . ."

This change established minimum as well as maximum salaries for clerical employees, to be fixed by the Division and approved by the Industrial Commission. It removed the condition of approval by the Commission with respect to salaries other than for clerical employees. It is reasonable to construe the sentence as establishing fixed salaries for reporters or other employees, except clerical employees, and for legal advisors.

The same sentence structure was followed in the 1965 revision.

The 1967 revision of Section 287.615 is as follows:

"The division may appoint or employ such other persons as may be necessary to the proper administration of this chapter. The salaries shall be not less than three hundred dollars nor more than four hundred fifty dollars per month for any clerical employee, and all salaries to clerical employees within said range shall be fixed by the division and approved by

Honorable Donald N. LaTowsky -

the industrial commission; eight hundred dollars per month to any reporter or other employee; and one thousand two hundred dollars per month to any legal advisor. The salary of each referee shall be one thousand two hundred and fifty dollars per month, and the salary of each referee in charge of the offices of the division in St. Louis, Kansas City, Springfield, St. Joseph, Joplin, and Cape Girardeau, and any other branch office of the division shall be one thousand three hundred dollars per month. The appointees in each classification shall be selected as nearly as practicable in equal numbers from each of the two political parties casting the highest and next highest number of votes for governor in the last preceding state election." (Emphasis added).

The provision of minimum and maximum salaries for clerical employees and for approval of salaries of clerical employees by the Industrial Commission has been retained. Also, the section provides fixed salaries for reporters or other employees, except clerical employees, legal advisors and for referees. It requires Industrial Commission approval for clerical salaries only. When we remove the portion of the sentence pertaining to clerical salaries, the sentence reads "the salaries shall be . . . eight hundred dollars per month to any reporter or other employee and one thousand two hundred dollars per month to any legal advisor", and supports the interpretation indicated above.

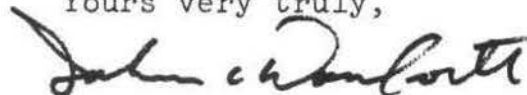
CONCLUSION

It is the opinion of this office that no clerical employee of the Division of Workmen's Compensation can be paid more than four hundred fifty dollars (\$450.00) per month.

There can be no class of employees in the Division of Workmen's Compensation with any salary rate between four hundred fifty dollars (\$450.00) and eight hundred dollars (\$800.00) per month.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Carroll J. McBride.

Yours very truly,



JOHN C. DANFORTH
Attorney General

ELECTIONS:
SCHOOL ELECTIONS:

1. In the election on April 7, 1970, the school board of a six director school district located in Jackson County, Missouri must conduct its election at the polling places which the Jackson County Board of Election Commissioners designate, pursuant to paragraph 1 of Section 111.111 V.A.M.S. (1969-70 Supp.), for voting on school issues. 2. A six director school district located in Jackson County, Missouri must conduct its election at each and every polling place designated by the Jackson County Board of Election Commissioners, pursuant to Section 111.111 V.A.M.S. (1969-70 Supp.), for voting on school issues.

OPINION NO. 195

March 4, 1970



Honorable Jack E. Gant
Senator, Sixteenth District
Suite 535, Argyle Building
306 East 12th Street
Kansas City, Missouri 64106

Dear Senator Gant:

This opinion is in response to your request for an official ruling on the following questions concerning the conducting of school and state elections on April 7, 1970.

"1. Can the school board of a six director district located in Jackson County, Missouri, within the boundaries of the Jackson County Board of Election Commissioners conduct an election at a polling place outside of its own school district.

"2. Can a six director school district be required by the Jackson County Board of Election Commissioners to conduct an election at all the polling places designated by the Election Board within the school district boundaries."

Honorable Jack E. Gant

I.

Because a statewide special election is being held on April 7, 1970, this office has previously determined in Opinion No. 161 dated March 3, 1970, to the Honorable Floyd E. Lawson (a copy of which is enclosed), that Section 111.111 V.A.M.S. (1969-70 Supp.) places the responsibility for designating polling places and for selecting election officials for that election on "the county clerk, board of election commissioners or other official having authority over general elections". In the area over which the Jackson County Board of Election Commissioners has authority over general elections, the Board is required by Section 111.111 to "designate one polling place for the several elections in each precinct or district in the political subdivision in which the elections are held." See paragraph 1, Section 111.111.

It is the opinion of this office that the school board of a six director district located in Jackson County, Missouri, must utilize each and every polling place designated by the Jackson County Board of Election Commissioners for voting on that school district's issues and, that the school district has no power to designate other polling places for conducting its election on April 7, 1970.

II.

We believe that this question has already been answered by the response to Question No. I in this opinion and, by the response to Question No. II in Opinion No. 161 dated March 3, 1970.

CONCLUSION

It is the opinion of this office that:

1. In the election on April 7, 1970, the school board of a six director school district located in Jackson County, Missouri must conduct its election at the polling places which the Jackson County Board of Election Commissioners designate, pursuant to paragraph 1 of Section 111.111 V.A.M.S. (1969-70 Supp.), for voting on school issues.

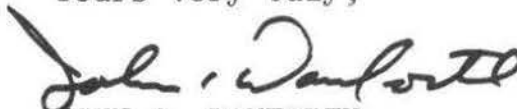
2. A six director school district located in Jackson County, Missouri must conduct its election at each and every polling place designated by the Jackson County Board of Election Commissioners,

Honorable Jack E. Gant

pursuant to Section 111.111, V.A.M.S. (1969-70 Supp.), for voting on school issues.

The foregoing opinion, which I hereby approve, was prepared by my assistant, D. Brook Bartlett.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosure:

Op. No. 161,
3-3-70, Lawson

DEPARTMENT OF PUBLIC HEALTH
AND WELFARE:
DIVISION OF WELFARE:
COOPERATIVE AGREEMENTS:

The Division of Welfare has the authority to enter into agreements with Model City agencies to provide various types of services for low-income residents, and that the recipients of such services may include such persons who have been or who are likely to become applicants for or recipients of such aid as well as those presently receiving welfare assistance.

OPINION NO. 196

March 6, 1970

Honorable Proctor N. Carter
State Welfare Director
Division of Welfare
Broadway State Office Building
Jefferson City, Missouri 65101



Dear Mr. Carter:

This opinion is in response to your question which is stated as follows:

"St. Louis and Kansas City have been chosen as Model Cities eligible to receive Federal grants to improve the living environment and general welfare of people living in certain geographic areas in such cities. The Federal legislation calls for concerted attack, bringing to bear the resources of Federal, State and Local Governments, and private efforts, to develop model neighborhoods.

"We have been engaged in discussions with the Model City Agencies in both St. Louis and Kansas City, and it has been proposed that the Division of Welfare purchase various types of services for low income residents of those geographic areas; the primary services would be day-care and homemaker services. Model City Agencies are extremely interested in having these services available to low income persons other than or in addition to recipients of assistance. The Model City Agencies would provide 25% of the costs and

Honorable Proctor N. Carter

we would be able to claim 75% matching through the Department of Health, Education and Welfare.

"Under the 1967 Amendments to the Federal Social Security Act, the State has the option to include persons, families and children for services in addition to those currently receiving financial assistance who 'has been or is likely to become an applicant for or recipient of such aid'. These are the low income persons not receiving money payments for assistance but who are referred to in the Federal Guideline as 'former and potential recipients.'

"We would appreciate receiving an opinion from you as to whether or not the Division of Welfare has statutory authority for purchasing services for persons who are not on the assistance rolls but who do qualify as being persons of low income living within the target area of a Model City Project."

It is our understanding that the Model City agencies are providing 25% of the funding and the other 75% is to be federally funded.

The amendments to the Federal Social Security Act that you refer to are with respect to benefits payable to the states under the plans for aid to dependent children, old-age assistance, permanent and total disability, and aid to the blind. The particular sections that are concerned are respectively located in 42 U.S.C.A. §603 (a) (3) (A) (iii), 42 U.S.C.A. 303 (a) (4) (A) (iii), 42 U.S.C.A. 1353 (a) (3) (A) (iii), 42 U.S.C.A. 1203 (a) (3) (A) (iii). Under these statutes, the Secretary of Health, Education and Welfare may grant the 75% for the operation of the state plan for expenditures in aid of such persons who have been or who are likely to become applicants for or recipients of such aid.

With respect to the powers of the Division of Welfare, we note that the Division has been given extremely broad powers.

Among such powers are the following as provided by Section 207.020, RSMo 1967 Supp.

"1. In addition to the powers, duties and functions vested in the division of welfare by other provisions of this chapter or by other laws of this state, the division of

Honorable Proctor N. Carter

welfare shall have the power:

* * *

"(3) To administer, disburse, dispose of and account for funds, commodities, equipment, supplies or services, and any kind of property given, granted, loaned, advanced to or appropriated by the state of Missouri for any of the purposes herein;

* * *

"(6) To cooperate with the United States government in matters of mutual concern pertaining to any duties wherein the division of welfare is acting as a state agency, including the adoption of such methods of administration as are found by the United States government to be necessary for the efficient operation of state plans hereunder;

* * *

"(8) To establish, extend and strengthen child welfare services for the protection and care of homeless, dependent and neglected children and children in danger of becoming delinquent;

* * *

"(10) To administer state child welfare activities and develop state services for the encouragement and assistance of adequate methods of community child welfare organizations;

* * *

"(12) To initiate or cooperate with other agencies in developing measures for the prevention of dependency and the rehabilitation of needy persons;

* * *

"(14) To establish or cooperate in research or demonstration projects relative to the welfare program, such as those relating to

Honorable Proctor N. Carter

the prevention and reduction of dependency and economic distress, or which will aid in effecting coordination of planning between private and public welfare agencies, or which will help improve the administration and effectiveness of programs carried on or assisted under the federal Social Security Act and the programs related thereto;

* * *

"(15) To provide appropriate public welfare services to promote, safeguard and protect the social well-being and general welfare of children and to help maintain and strengthen family life, and to provide such public welfare services to aid needy persons who can be so helped to become self-supporting or capable of self-care;"

It appears clear that the powers enumerated are in furtherance of the provisions of Section 39 of Article IV of the Missouri Constitution, which provides that in all matters of the public welfare the General Assembly may provide by law for cooperation with the United States, or with other states. It is also clear from Section 37, Article IV that the health and welfare of the people are matters of primary public concern.

Further, we note that Section 38(a) of Article III of the Constitution provides that money or property may be received from the United States and may be redistributed together with public money of this state for any public purpose designated by the United States.

In our view, the various express statutory welfare eligibility requirements do not constitute a limitation upon the powers that have been given the Division of Welfare to accomplish its purposes and objectives.

We are of the view, therefore, that such funds may be received from the United States and may be expended for the purposes agreed in such plan or plans and that the recipients of the benefits need not be limited to persons who are recipients of present welfare benefits, but may include such other persons not now receiving money payments for assistance, but who are referred to in the federal laws as persons who have been or who are likely to become applicants for aid.

Honorable Proctor N. Carter

CONCLUSION

It is, therefore, the opinion of this office that the Division of Welfare has the authority to enter into agreements with Model City agencies to provide various types of services for low-income residents, and that the recipients of such services may include such persons who have been or who are likely to become applicants for or recipients of such aid as well as those presently receiving welfare assistance.

The foregoing opinion, which I hereby approve, was prepared by my assistant John C. Klaffenbach.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being more prominent.

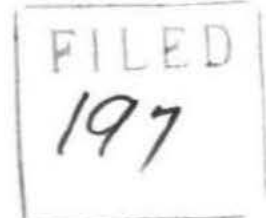
JOHN C. DANFORTH
Attorney General

TOWNSHIPS: 1. A vacancy in the office of township trustee
OFFICERS: being also a vacancy in the board of directors
of the township, is to be filled by the county
court. Both the township clerk and the county clerk have authority
to administer the oath of office to the newly appointed township
trustee. 2. A vacancy in the office of township assessor is to be
filled by action of the township board. The oath of office of such
assessor may be administered by any officer having authority to ad-
minister oaths, other than the township clerk who is ex officio the
township assessor.

April 15, 1970

OPINION NO. 197

Honorable Carl D. Gum
Prosecuting Attorney
Cass County Court House
Harrisonville, Missouri 64701



Dear Mr. Gum:

This official opinion is issued in response to the request contained in your letter relative to the filling of vacancies in township offices and boards of directors. The questions raised by your letter are as follows:

"1. When the trustee of the township board dies, do the remaining township board members fill the vacancy or does the county court? Who swears in the newly appointed trustee, the township clerk or the county clerk?

"2. When the township assessor resigns, who appoints the successor assessor, the township board or the county court? Who swears in the newly appointed assessor?"

The pertinent provisions of the Missouri statutes are as follows:

Section 65.110, RSMo 1959.

"Officers to be chosen.--There shall be chosen at the biennial election in each township one trustee, * * * one township clerk, who shall

Honorable Carl D. Gum

be ex officio township assessor, and two members of the township board."

Section 65.160, RSMo 1959.

"Oath-shall assume office, when.--Every person chosen or appointed to the office of township trustee and ex officio treasurer, member of the township board, * * * or township clerk, and ex officio township assessor, before he enters on the duties of his office and within ten days after he shall be notified of his election or appointment, shall take and subscribe, before any officer authorized to administer oaths, such oath or affirmation as is prescribed by law; * * * "

Section 65.200, RSMo 1959.

"Vacancies in office--how filled.--* * * when any vacancy shall happen in any township office from any cause, it shall be lawful for the township board to fill such vacancy by appointment, and the person so appointed shall hold the office and discharge all the duties of the same during such unexpired term, and until his successor is elected or appointed and qualified, * * * provided, that any vacancy in the township board shall be filled by appointment of the county court."

Section 65.290, RSMo 1959.

"Board of directors--Duties.--In each township in this state, organized under the provisions of this chapter, there shall be a board of directors, composed of the township trustee and members of the township board, * * * "

By the express terms of Section 65.200, it is clear that authority to fill a vacancy in the township board is in the county court while authority to fill vacancies in all other township offices is lodged with the township board. The township trustee is a member of the township board of directors. Section 65.290. Accordingly, a vacancy in the office of trustee would also be a vacancy in the township board which should be filled by the county court. See State v. Olenhouse, 23 S.W.2d 83 (Mo.Sup.1929).

Section 65.160 states that the township trustee and the township collector and ex officio township assessor shall take and subscribe to an oath before he enters on the duties of his office. This oath is to be taken and subscribed before any officer authorized to

Honorable Carl D. Gum

administer oaths. Both the county clerk and the township clerk are officers authorized to administer oaths; therefore, either may legally administer the oath of office to the township trustee. Inasmuch as the township clerk also serves as ex officio township assessor, the oath of office to be taken by the assessor should be administered by some authorized officer other than the township clerk. Under the provisions of the statute any officer authorized to administer oaths may perform this function.

CONCLUSION

Therefore, it is the opinion of this office that:

1. A vacancy in the office of township trustee being also a vacancy in the board of directors of the township, is to be filled by the county court. Both the township clerk and the county clerk have authority to administer the oath of office to the newly appointed township trustee.
2. A vacancy in the office of township assessor is to be filled by action of the township board. The oath of office of such assessor may be administered by any officer having authority to administer oaths, other than the township clerk who is ex officio the township assessor.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John E. Park.

Very truly yours,



JOHN C. DANFORTH
Attorney General

ELECTIONS:
REGISTRATION:

County registration under Chapter
114, RSMo, does apply to and should
be used in a statewide special elec-

tion even though other political subdivisions are holding elections at the same time thereby making the provisions of Section 111.111, Senate Bill No. 134, 75th General Assembly, applicable. However, Section 162.361, Senate Bill No. 136, 75th General Assembly, determines the extent to which county registration is applicable to school elections held in a third class county when the school elections are conducted jointly with a statewide special election pursuant to Section 111.111.

OPINION NO. 198

June 11, 1970

Honorable James H. Counts
Prosecuting Attorney
Reynolds County
P. O. Box 52
Centerville, Missouri 63633



Dear Mr. Counts:

This letter is in response to your request for an official opinion of this office on the following questions:

"[1] Reynolds County is a third class county with voter registration. Voter registration is to be employed in all precinct elections, but is not employed in school district elections. Since the Income Tax Referendum issue is a precinct election whereas the school district elections are not precinct elections, must or can voter registration be used in the upcoming election? [2] Also, does the County Clerk or the County Court pick the election Judges or Clerks? [3] Finally, who provides and pays for the election supplies?"

I.

If a third class county has adopted county registration pursuant to Chapter 114, RSMo 1959, as amended, registration applies to and should be used in a statewide special election. Section 114.240, RSMo 1967 Supp.

However, the application of registration laws to school district elections is limited. Section 162.361, Senate Bill No. 136, 75th General Assembly, requires that voter registration be used in

Honorable James H. Counts

school elections in certain school districts. Subsection 1 of Section 162.361, provides that the registration laws applicable to general elections shall apply to all elections in six director school districts located in a city of more than 75,000 inhabitants; or in counties which have more than 700,000 inhabitants or counties of the second class which contain a city or part of a city with more than 500,000 inhabitants. Subsection 2 requires that when a school district has within it a city of not less than 10,000 nor more than 50,000 inhabitants, all school elections shall be conducted in accordance with the laws regulating the registration of voters within the city, ". . . and that qualified voters outside the corporate limits of the city, not required to register for general elections, shall sign an affidavit as to their residence within the school district. . . ."

In all other school districts in a third class county registration would not be applicable to the school elections conducted at the same time as a statewide special election. Every person qualified to vote in the school district election pursuant to Section 160.011(16), RSMo 1967 Supp., should be permitted to vote in the school election regardless of whether he is registered to vote pursuant to the requirements of Chapter 114, RSMo 1959, as amended.

II.

Pursuant to the requirements of Section 111.111, V.A.M.S., 1969-70 Supp., the county clerk or other official having authority over general elections shall designate the election judges and clerks. See Opinion No. 161 dated March 4, 1970, to the Honorable Floyd E. Lawson, a copy of which is enclosed.

III.

We are enclosing herewith a copy of Opinion No. 181 dated May 18, 1970, which we believe fully answers this question.

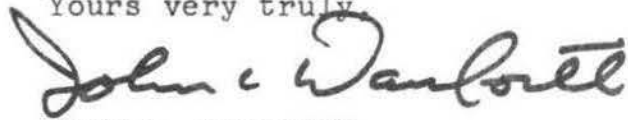
CONCLUSION

Therefore, it is the opinion of this office that county registration under Chapter 114, RSMo, does apply to and should be used in a statewide special election even though other political subdivisions are holding elections at the same time thereby making the provisions of Section 111.111, Senate Bill No. 134, 75th General Assembly, applicable. However, Section 162.361, Senate Bill No. 136, 75th General Assembly, determines the extent to which county registration is applicable to school elections held in a third class county when the school elections are conducted jointly with a statewide special election pursuant to Section 111.111.

Honorable James H. Counts

The foregoing opinion, which I hereby approve, was prepared by my Assistant D. Brook Bartlett.

Yours very truly,

A handwritten signature in cursive script, reading "John C. Danforth". The signature is written in dark ink and is positioned above the printed name and title.

JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 161
3-4-70, Lawson

Op. No. 181
5-18-70, Bauer

ELECTIONS:

SPECIAL ELECTIONS:

SCHOOL ELECTIONS:

1. The county clerk is not required by Section 111.111, Senate Bill No. 134 of the 75th General Assembly, V.A.M.S. (1969-70 Supp.) to designate

one polling place in each of the two wards in Crane, Missouri. The residents of the City of Crane who reside in the Crane School District will vote on all propositions on which they are entitled to vote on April 7, 1970, including school issues, at the polling place or places designated by the county clerk pursuant to Section 111.111. 2. Pursuant to paragraph 2 of Section 111.111, the county clerk designates the election judges and election clerks to conduct the election on April 7, 1970, at each polling place designated by the clerk pursuant to paragraph 1 of Section 111.111. The reference to the city clerk in Section 79.030, RSMo 1959, does not apply to the election to be held on April 7, 1970. Four election judges and two election clerks, or under certain circumstances, six judges and four clerks shall be appointed for each precinct pursuant to Sections 111.181 and 111.231, Senate Bill No. 134 of the 75th General Assembly, V.A.M.S. (1969-70 Supp). 3. There is no authority for the county clerk to furnish ballots for school elections or ballots for city elections in fourth class cities.

OPINION NO. 199

March 4, 1970

Honorable Kenneth R. Babbitt
Prosecuting Attorney, Stone County
Post Office Box 185
Galena, Missouri 65656



Dear Mr. Babbitt:

This opinion is in response to your request for an official opinion reading as follows:

"I have run into a lot of questions concerning the effect of Revised Sec. 111.111, concerning the duties of the County Clerk when there are elections on the same date involving both state, county, city and school board people, and, also, in cases where special elections are held at the same time.

"In the past, all city elections of the two-fourth cities within Stone County have been conducted pursuant to Sec. 79.030 and Chapter 111 without Section 111.111 coming into operation.

"Could I please get an opinion from you on the following questions:

Honorable Kenneth R. Babbitt

"1. Under Section 111.111, does the County Clerk designate one polling place in each of the two wards in Crane, Missouri? If so, will other voters in the township residing outside the city limits vote at one of these polling places? If so, which one? Will all the residents of the townships who are in the Crane School District vote at one of these polling places? If so, which one? Or, will they vote at the schoolhouse?

"2. Under Section 111.111 (2) the County Clerk shall designate the 'election officials' in each polling place. Does this refer to the judges and clerks mentioned elsewhere in Chapter 111, e.g., 111.181 and 111.231? Does it refer to the city clerk mentioned in Section 79.030, allowing him to choose judges and clerks? How many judges and clerks are authorized in a combined state, city and school election?

"3. Is Section 111.371 interpreted to mean that the County Clerk prints ballots for the city election and the school election?"

Throughout this opinion we will assume that your inquiries concerning the application of Section 111.111, Senate Bill No. 134 of the 75th General Assembly, were made with reference to the elections scheduled for April 7, 1970. On this date a statewide special election and elections in various political subdivisions will be held.

I.

Section 111.111 requires that the county clerk or board of election commissioners ". . . shall designate one polling place for the several elections in each precinct or district in the political subdivision in which the elections are held." We interpret the word "district" to have reference to an election district created by the county court pursuant to Section 111.091 V.A.M.S. (1969-70 Supp.). Therefore, it is the opinion of this office that Section 111.111 requires that the county clerk designate one polling place in each precinct or voting district within the City of Crane, Missouri. Section 111.111 does not refer to wards and, therefore, the county clerk has no authority to determine the location of the polling places based on the boundaries of the wards in Crane, Missouri.

The residents of Crane, Missouri, who live in the Crane School District will vote on all propositions to which they are entitled

Honorable Kenneth R. Babbitt

to vote, on April 7, 1970, including school issues, at the polling place or places designated by the county clerk pursuant to Section 111.111. See Opinion No. 161 of this office, dated March 4, 1970, a copy of which is enclosed herewith.

II.

Paragraph 2 of Section 111.111 states as follows:

"The county clerk, board of election commissioners or other proper official shall designate the election officials in each polling place who shall conduct the election for all subdivisions involved."

We believe that the language ". . . the election officials in each polling place who shall conduct the election. . ." refers to the election judges and election clerks. Section 79.030, RSMo 1959, applicable to fourth class cities provides that ". . . all duties specified in the state election laws to be performed by the county clerk shall be performed by the city clerk in the city election. . . ." (emphasis supplied). As we have pointed out above, in addition to any city election which may be held on April 7, 1970, there will be at least one other election being held--the statewide special election. Therefore, it is the opinion of this office that the second paragraph of Section 111.111 grants to the county clerk and only to the county clerk the power to designate the election officials in each polling place who shall conduct the election for all matters being submitted to the voters on April 7, 1970.

In a situation where there is a combined state, city and school election held jointly at one polling place, we find no authority in Chapter 111 for the appointment of more than four judges for each election district and precinct in the county (except two additional judges shall be appointed in any precinct where two hundred or more votes were cast in the next to last preceding general election) or for the appointment of more than two clerks in each precinct (except two additional clerks shall be appointed in any precinct where two hundred or more votes were cast in the next to last preceding general election). See Sections 111.181 and 111.231, V.A.M.S. (1969-70 Supp.).

III.

You have asked whether Section 111.371, Senate Bill No. 134 of the 75th General Assembly, requires the county clerk to have ballots printed for school elections and for city elections in fourth class cities. Section 111.611, Senate Bill No. 134 of the 75th General Assembly provides as follows:

Honorable Kenneth R. Babbitt

"The provisions of sections 111.141, 111.151, 111.261, 111.271, 111.341 to 111.471 and sections 111.501 and 111.521 apply to all election precincts in this state except to townships or village elections, to school elections, to any city election in a city of the fourth class or to any election in any city of less than three thousand inhabitants existing under any special law."

It is clear that under the provisions of Section 111.611, the provisions of Section 111.371 are not applicable to school elections or to city elections in fourth class cities.

CONCLUSION

It is the opinion of this office that:

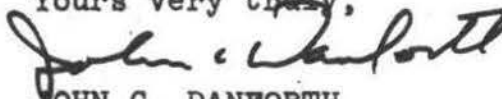
1. The county clerk is not required by Section 111.111, Senate Bill No. 134 of the 75th General Assembly, V.A.M.S. (1969-70 Supp.) to designate one polling place in each of the two wards in Crane, Missouri. The residents of the City of Crane who reside in the Crane School District will vote on all propositions on which they are entitled to vote on April 7, 1970, including school issues, at the polling place or places designated by the county clerk pursuant to Section 111.111.

2. Pursuant to paragraph 2 of Section 111.111, the county clerk designates the election judges and election clerks to conduct the election on April 7, 1970, at each polling place designated by the clerk pursuant to paragraph 1 of Section 111.111. The reference to the city clerk in Section 79.030, RSMo 1959, does not apply to the election to be held on April 7, 1970. Four election judges and two election clerks, or under certain circumstances, six judges and four clerks shall be appointed for each precinct pursuant to Sections 111.181 and 111.231, Senate Bill No. 134 of the 75th General Assembly, V.A.M.S. (1969-70 Supp.).

3. There is no authority for the county clerk to furnish ballots for school elections or ballots for city elections in fourth class cities.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, D. Brook Bartlett.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 161
3-4-70, Lawson

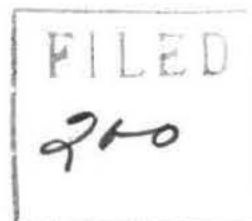
USURY:

Direct loans by Veterans Administration are not subject to Missouri usury statutes.

OPINION NO. 200

March 9, 1970

Mr. Roy L. Carver
Director
Division of Veterans Affairs
Broadway State Office Building
Jefferson City, Missouri 65101



Dear Mr. Carver:

This official opinion is issued in response to your request of February 16, 1970, in which you ask whether the Missouri usury statutes apply to "direct home loans" made by the Veterans Administration. We assume that the loans in question are made directly by the federal agency to eligible borrowers, without the intervention of any private lender.

The Veterans Administration, of course, is an agency of the United States established by Congress in the exercise of its delegated powers. By reason of the "supremacy clause" (clause 2, Article VI of the Constitution of the United States), federal activities so authorized by Congress are not subject to restriction by reason of state statutory provisions.

In *Franklin National Bank v. New York*, 347 U.S. 373 (1954), a state statute restricting the use of the term "savings" by banks was held not to apply to a national bank having authority to accept savings deposits. *Free v. Bland*, 369 U.S. 663 (1962), holds that Treasury Regulations regarding the form of ownership of United States Savings Bonds prevail over state laws regulating testate or intestate succession. Under the rule of *Sperry v. Florida*, 373 U.S. 379 (1963), a patent agent duly accredited by the patent office was permitted to operate in Florida in spite of the attempts of the state authorities to prohibit his activities on the claim that they constituted the "unauthorized practice of law."

Mr. Roy L. Carver

It follows that the Veterans Administration may make direct loans within its authority as established by federal law, without becoming subject to state usury statutes.

CONCLUSION

No Missouri statutes regulating interest rates apply to loans made by the Veterans Administration directly to borrowers and without the intervention of any private lending agency.

The foregoing opinion, which I hereby approve, was prepared by my special assistant, Charles B. Blackmar.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a stylized "D".

JOHN C. DANFORTH
Attorney General

CORPORATIONS.
FEES:
CONSTITUTIONAL LAW:

1. In accordance with subsection 5 of Section 351.585, RSMo Supp. 1967, a foreign corporation seeking to do business in Missouri can be required to pay a qualification fee to Missouri

on the value of all its property to be used in this state when the authorized par value capital of the corporation is less than the value of its property in this state. 2. Subsection 5 of Section 351.585, RSMo Supp. 1967, does not place a burden on interstate commerce which violates Article I, Section 8 of the United States Constitution.

April 15, 1970

OPINION NO. 202

Honorable Charles E. Valier
State Representative - District 69
14 North Kingshighway
St. Louis, Missouri 63108



Dear Mr. Valier:

This is to acknowledge receipt of your request for a formal opinion from this office which reads in part as follows:

"My question is, can a foreign corporation seeking to do business in Missouri be lawfully required to pay a fee to Missouri on the value of all its property to be used in Missouri when the authorized par value capital of the corporation is substantially less than the value of all its property in Missouri. If your answer to this question is yes, then my further question is, does not such a requirement because it discriminates against a foreign corporation place a burden on commerce which violates Article 1, Section 8 of the United States Constitution.

"An example can best explain the problem that arises:

"Suppose a foreign corporation with authorized par value capital of \$30,000.00 and property to be used in Missouri of a value of \$1,400,000.00 subject to any debt seeks to do business in Missouri (and only in Missouri). Under a strict interpretation of Section 351.585 (5) that corporation would be required to pay fees of \$738.00, and \$10.00 for the privilege of doing business in Missouri for a total of \$748.00. If the same corporation was

Honorable Charles E. Valier -

required to pay a fee based on its authorized capital (as a like Missouri corporation would) the fee would be \$53.00 and \$10.00 for the privilege of doing business in Missouri for a total of \$63.00.

"Under a strict interpretation of the statute, a foreign corporation would pay a fee of \$748.00 and an identical Missouri corporation would pay a fee of only \$53.00."

Subsection 5 of Section 351.585, RSMo Supp. 1967, reads as follows:

"5. Such corporation shall be required to pay into the state treasury upon the proportion of its stated capital and surplus represented by its property and business in Missouri a domestication tax or fee equal to the incorporating tax or fee of corporations formed under or subject to this chapter, with an additional ten dollars as a fee for issuing said certificate of authority to do business in this state; provided, however, that the value of the proportion of the stated capital and surplus of said corporation represented by its property and business in Missouri shall, in no event, be less than the value of the corporation's property located in the state of Missouri."

We will first consider the issue as to whether a foreign corporation seeking to do business in Missouri can be required to pay a qualification fee to Missouri on the value of all its property to be used in this state when the authorized par value capital of the corporation is substantially less than the value of its property in this state.

It is well settled law that, except as a foreign corporation is engaged in interstate or foreign commerce, or is employed as an agency or instrumentality of the federal government, or is otherwise within the protection of the Constitution of the United States, a state's power to prescribe the terms and conditions upon which a foreign corporation shall be permitted to enter and carry on business is absolute. 17 W. Fletcher, Private Corporations, Section 8303 at 39 (Rv.Ed. 1960). This principal has also been followed in Missouri. See State vs. Standard Oil Co., 194 Mo. 124, 91 S.W. 1062; and, Roeder vs. Robertson, 202 Mo. 522, 100 S.W. 1086. As far as the power of the state to require payment of a qualification fee or tax, as a condition to admission into the state, it is equally clear that it is within the power of the state, provided that the

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imposition does not violate any constitutional prohibition. Hanover Fire Ins. Co. vs. Carr, 272 U.S. 494, 47 S.Ct. 179, 71 L.Ed. 372 (1926). In other words, where the federal Constitution is not violated the state may prescribe any entrance fee it desires. State vs. Crawford, 90 Fla. 264, 105 So. 446.

We will next consider the issue as to whether or not the Missouri statute places a burden on commerce which violates Article I, Section 8 of the United States Constitution. In this connection, it should be noted that there is a distinction between an admission fee and a franchise fee in that the former refers to the power of a state to enact a fee for the privilege of doing business in the state, while the latter refers to a levy for revenue purposes upon the exercise of the franchise or contract rights previously granted. St. Louis Southwestern Ry. Co. vs. Stratton, 353 Ill. 273, 187 N.E. 498, cert.den. 291 U.S. 673, 78 L.Ed. 1062, 54 S.Ct. 458 (1934). However, the governing law seems to be the same without regard to whether the imposition is an entrance fee or a franchise tax payable annually after admission into the state. 18 W. Fletcher, Private Corporations, Section 8817 at 616 (Rv.Ed. 1960).

The commerce clause of the federal Constitution prohibits a state from exacting license fees from a corporation engaged exclusively in interstate commerce. Alpha Portland Cement Co. vs. Massachusetts, 268 U.S. 203, 45 S.Ct. 477, 69 L.Ed. 916 (1925). On the other hand, license fees or franchise tax fees upon foreign corporations engaged in both intrastate and interstate commerce are generally sustained, as against objections based on the commerce clause where the taxes or entrance fees are measured by the local or intrastate business, income property, or capital. In this connection, it should be noted that subsection 5 of Section 351.585, RSMo Supp. 1967, assesses license fees upon the basis of "issued" capital stock represented by business and property in the jurisdiction.

Thus, in Western Cartridge Co. vs. Emerson, 281 U.S. 511, 50 S.Ct. 388, 74 L.Ed. 1004 (1930), a state license fee or franchise tax upon a foreign manufacturing and selling corporation, based on the proportion of the issued capital stock represented by business transacted and property located in the taxing state, was held not to be an unlawful burden on interstate commerce, as applied to a foreign manufacturing and selling corporation doing both interstate and local business within the state, having its factories and principal office therein, as well as nearly all its property. The statute in question provided for a franchise tax of five cents on each one hundred dollars of "issued" capital stock represented by business transacted and property located in the state. The court said at page 513-514:

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"The tax in question was not laid directly upon interstate commerce, or any of its elements. For the determination of the amount the taxpayer's business and property located in Illinois is divided by the total of all its business and property and that percentage is applied to the issued shares and the resulting number taken for taxation at the rate of 5 cents per \$100. As the amount depends on the relation each to the others of the various elements employed in the calculation, the fee or tax does not directly depend upon the amount of the taxpayer's interstate transactions. . . . And it is plain that, if the fee or tax in question affected petitioner's interstate or foreign commerce at all, the burden was indirect and remote and not a violation of the commerce clause."

Earlier in the case of Southern Ry. Co. vs. Watts, 260 U.S. 519, 43 S.Ct. 192, 67 L.Ed. 375 (1923), a state franchise tax upon a foreign railroad company engaged in both local and interstate business in the state for the privilege of doing intrastate business there, measured by the value of the company's property within the state, was held not to violate the commerce clause, where its payment was not made a condition precedent to the right to do interstate business.

In Southern Realty Corp. vs. McCallum, 65 F.2d 934 (1933), CCA 5th, cert.den. 290 U.S. 692, 54 S.Ct. 127, 78 L.Ed. 596 (1933), a franchise tax upon a foreign corporation for the privilege of doing business within the state based upon that proportion of the outstanding capital stock, surplus, and undivided profits, plus the amount of outstanding bonds, notes, and debentures, other than those maturing in less than one year from the date of issue, which the gross receipts from its business done within the taxing state bore to the total gross receipts of the corporation from its entire business, was held not to involve any unlawful interference with interstate commerce. The court further stated at page 936:

"That a state may impose such a franchise or business privilege tax, and may measure it by the capital stock and surplus used by the corporation in its business or by its income therefrom, although business is done in more states than one, without unconstitutional interference with interstate commerce

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or other federal prerogative and without a taxing of property beyond the jurisdiction of the taxing state, when the capital by which the tax is measured is reasonably apportioned according to the business there done, is settled by many decisions."

In Atlantic Lumber Co. vs. Commissioner of Corporations and Taxation, 298 U.S. 553, 56 S.Ct. 887, 80 L.Ed. 1328 (1936), the Supreme Court of the United States held that no unconstitutional burden was imposed upon interstate commerce by a state statute which imposed upon foreign corporations, with respect to the carrying on or doing a business within the state, a franchise tax based upon such proportion of the fair value of the capital stock of the corporation as the value of the assets employed in the state bore to the value of its total assets, as applied to a foreign wholesale lumber company carrying on both local and interstate business in the state but having in the taxing state its principal office at which it accepted orders for goods taken in the state and in other states, which were filled from sources outside the state, and in which it received payment.

Finally, in Atlantic Refining Co. vs. Commonwealth of Virginia, 302 U.S. 22, 58 S.Ct. 75, 82 L.Ed. 24 (1937), although the qualification fee was based upon the total authorized capital of a corporation rather than capital stock represented by business and property in the jurisdiction, the Supreme Court of the United States sustained the statute against objections based upon the commerce, due process and equal protection clauses of the federal Constitution. The language of the court at page 26-27 was as follows:

"As the entrance fee is not a tax, but compensation for a privilege applied for and granted, no reason appears why the State is not as free to charge \$5,000 for the privilege as it would be to charge that amount for a franchise granted to a local utility, or for a parcel of land which it owned. If Virginia had the power to charge \$5,000 for the privilege, the particular measure applied by the Legislature in arriving at that sum would seem to be legally immaterial; . . . 'The selected measure may appear to be simply a matter of convenience in computation . . . and if the tax purports to be laid upon a subject within the taxing power of the State, it is not to be condemned . . . by any artificial rule.'"

As a result of the above authorities, it is our view that subsection 5 of Section 351.585, RSMo Supp. 1967, does not violate Article I, Section 8 of the United States Constitution.

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CONCLUSION

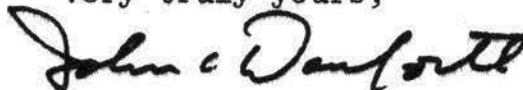
The opinion of this office is as follows:

1. In accordance with subsection 5 of Section 351.585, RSMo Supp. 1967, a foreign corporation seeking to do business in Missouri can be required to pay a qualification fee to Missouri on the value of all its property to be used in this state when the authorized par value capital of the corporation is less than the value of its property in this state.

2. Subsection 5 of Section 351.585, RSMo Supp. 1967, does not place a burden on interstate commerce which violates Article I, Section 8 of the United States Constitution.

The foregoing opinion, which I hereby approve, was prepared by my assistant, B. J. Jones.

Very truly yours,

A handwritten signature in cursive script, reading "John C. Danforth".

JOHN C. DANFORTH
Attorney General

March 4, 1970



OPINION LETTER NO. 204

Honorable James A. Noland, Jr.
Senator, 33rd District
Osage Beach, Missouri 65065

Dear Senator Noland:

This letter is in answer to your opinion request in which you inquire concerning Senate Bill 13 of the 75th General Assembly. More specifically, your question is stated as follows:

"However, my question is whether or not the bill was so amended in its passage as to change the original intent of the bill, thus bringing about a salary decrease rather than a salary increase for the county clerks in 4th class counties. I am informed that this is the effect in certain of the 4th class counties. The bill might be unconstitutional."

As you are aware, we have issued Opinion No. 409, Holman, 10/9/69; Opinion No. 433, Holman, 10/9/69; and Opinion No. 87, Parker, 1/9/70, with respect to questions concerning Senate Bill 13. We have enclosed copies of these opinions.

The portion of Senate Bill 13 about which you are principally concerned relates to fees for fish and game licenses and permits and our holding that the county clerks of counties of the fourth class are limited by the provisions of the bill to a salary of \$5,500 including all fees whether for fish and game licenses or otherwise.

It is also our understanding that your question relates to the amendments during passage and to the title of the bill. Specifically, whether or not there is a violation of Section 21 or Section 23 of Article III of the Missouri Constitution.

Section 21 of Article III states in full as follows:

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"The style of the laws of this state shall be: 'Be it enacted by the General Assembly of the State of Missouri, as follows.' No law shall be passed except by bill, and no bill shall be so amended in its passage through either house as to change its original purpose. Bills may originate in either house and may be amended or rejected by the other. Every bill shall be read by title on three different days in each house."

Section 23 of Article III states:

"No bill shall contain more than one subject which shall be clearly expressed in its title, except bills enacted under the third exception in section 37 of this article and general appropriation bills, which may embrace the various subjects and accounts for which moneys are appropriated."

We will not quote the bill provisions in its progression through the legislature. However, we will refer to the caption and context.

Senate Bill No. 13 was originally introduced with the title "AN ACT Relating to the compensation of county clerks in certain counties." That same title was used in the perfected bill, and the title in the Truly Agreed To and Finally Passed Conference Committee Substitute for House Substitute for Senate Bill No. 13 was

"AN ACT To repeal sections 50.810, 51.360 and 51.400, RSMo 1959, and sections 51.300 and 51.350, RSMo Supp. 1967, relating to the compensation of county clerks in second, third and fourth class counties, and to enact three new sections in lieu thereof, relating to the same subject, with effective dates and a termination date."

Thus, it appears that the original title was carried to and extended in the Act as finally passed. The subject as originally expressed was completely expressed in the Truly Agreed To and Finally Passed version. Turning next to the context of the bill in its progression through the legislature, the bill as originally introduced provided for additional compensation for county clerks of second, third and fourth classes for additional services performed in inspecting voting precincts in the county and other

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related duties. The perfected act was the same as when introduced.

The Truly Agreed To and Finally Passed CCSHS SB No. 13 retained the provisions of the perfected bill.

In final passage Senate Bill No. 13 also contained other repeals and enactments relating to such county clerks. The most important of these changes was the amendment to Section 51.300, effective January 1, 1971, which sets schedules of fixed compensation for county clerks of the second, third and fourth class counties and provides that they pay fees received into the county treasury. Fees for the issuance of fish and game licenses or permits were excepted. However, insofar as county clerks of the fourth class counties are concerned, the act specifically provides that all fees shall be considered in determining the maximum compensation which could not be in excess of \$5,500.

The mere generality of the title will not prevent the act from being valid where the title does not tend to cover up or obscure legislation which is in itself incongruous and which has no necessary or proper connection. State v. Mullinix, 301 Mo. 385, 390, 257 S.W. 121 (1923).

We resolve the doubt, if any, in favor of validity if the challenged legislation is germane and related directly or indirectly to the main subject. State v. Beckman, 353 Mo. 1015, 185 S.W.2d 810 (1945).

With respect to your inquiry concerning a possible change in the purpose of the bill, it is our view that no violation of Section 21 of Article III exists.

The courts must make every reasonable intendment to sustain the constitutionality of a statute, Allied Mutual Ins. Co. vs. Bell, 353 Mo. 891, 185 S.W.2d 4 (1945). The question of constitutionality under this section is whether the bill was so amended in its passage as to change its original purpose. This purpose means the general purpose of the bill, not the mere details through which and by which that purpose is manifested and effectuated. State v. Mason, 155 Mo. 486, 55 S.W. 636 (1900). Likewise, the validity of an act is not affected by the fact that its title was amended during the progress of enactment. State vs. Field, 119 Mo. 593, 24 S.W. 752 (1894).

In our view, whether or not the result of the act is to increase or decrease the compensation of such county clerks, the validity of the act would not be affected. We note that the title stated that the act related to the compensation of such county

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clerks and there was no attempt by the legislature to indicate whether such act increased or decreased such compensation.

Although Section 13 of Article VII of the Constitution states that the compensation of such officers shall not be increased during the term of office, there is nothing in that section which prevents a decrease in the salary of an officer during his term of office. Lycette v. Wolff, 45 Mo. App. 489 (1891). Likewise, there is nothing elsewhere in the Constitution or in our statutes which prevents a decrease in the compensation of such officers.

After viewing the legislation in its progression through the legislature and considering the title, the purpose, and the subject matter contained therein, we are of the conclusion that there is no constitutional invalidity in Senate Bill No. 13.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Encs: Opinion No. 409, Holman, 10/9/69
Opinion No. 433, Holman, 10/9/69
Opinion No. 87, Parker, 1/9/70

HOUSING AUTHORITIES: Sections 99.010 to 99.230 of the
CITIES, TOWNS AND VILLAGES: Revised Statutes of Missouri, "The
Housing Authorities Law", authorizes
cities to determine and declare the need for a housing authority
upon a finding that insanitary or unsafe inhabited dwelling accom-
modations exist in such city or that there is a shortage of safe
or sanitary dwelling accommodations in such city available to
persons of low income at rentals they can afford. The cities
have no authority to declare a need for a limited housing authority
under the provisions of the Housing Authorities Law.

OPINION NO. 205

March 17, 1970

Honorable A. Basey Vanlandingham
Senator, 19th District
12 North Second Street
Columbia, Missouri 65201



Dear Senator Vanlandingham:

This opinion is in response to your request regarding an
interpretation of Sections 99.010 to 99.230, RSMo, known as
"The Housing Authorities Law."

Specifically, your question is stated as follows:

"Does a City have the legal right to limit
by their creative Resolution, Declaration,
or otherwise, the powers of a Housing
Authority as provided in Chapter 99 of the
1959 RSMo, thereby creating a limited
Housing Authority?"

It is our understanding that the City of Kirksville, Missouri,
wishes to create a "limited Housing Authority for low-income senior
citizens."

Section 99.040, RSMo 1959, provides:

"1. In each city (as herein defined) and in
each county of the state there is hereby
created a municipal corporation to be known
as 'the housing authority' of the city or
county; provided, however, that such author-
ity shall not transact any business or exer-
cise its powers hereunder until or unless
the governing body of the city or the county,
as the case may be, by resolution or other

Honorable A. Basey Vanlandingham

declaration shall determine at any time hereafter that there is need for an authority to function in such city or county. The determination as to whether or not there is such need for an authority to function may be made by the governing body upon the filing of a petition signed by fifty taxpayers of the city or county, as the case may be, asserting that there is need for an authority to function in such city or county and requesting that the governing body so declare.

"2. The governing body shall determine that there is need for a housing authority in the city or county, as the case may be, if it shall find that insanitary or unsafe inhabited dwelling accommodations exist in such city or county or that there is a shortage of safe or sanitary dwelling accommodations in such city or county available to persons of low income at rentals they can afford. In determining whether dwelling accommodations are unsafe or insanitary said governing body may take into consideration the degree of overcrowding, the percentage of land coverage, the light, air, space and access available to the inhabitants of such dwelling accommodations, the size and arrangement of the rooms, the sanitary facilities, and the extent to which conditions exist in such buildings which endanger life or property by fire or other causes.

"3. In any suit, action or proceeding involving the validity or enforcement of or relating to any contract of the authority, the authority shall be conclusively deemed to have become established and authorized to transact business and exercise its powers hereunder upon proof of the adoption of a resolution or other declaration by the governing body declaring the need for the authority. Such resolutions or other declaration shall be deemed sufficient if it declares that there is such need for an authority and finds in substantially the foregoing terms (no further detail being necessary) that either or both of the enumerated conditions exist in the city or county, as the case may be. A copy of such resolution or other declaration duly certified by the clerk shall be admissible in evidence in any suit, action or proceeding."

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Under the above sections, therefore, the municipal authority is created but may not transact any business until the governing body by resolution finds a need to exist in either or both of the two specifically enumerated circumstances. The resolution under the third paragraph of the above section is deemed sufficient if it declares that there is a need for an authority and finds that such conditions exist in the city.

Further, the sections provide for the appointment of commissioners (Section 99.050, RSMo 1959), constitute the authority a municipal corporation, and grant the authority numerous powers (Section 99.080, RSMo 1959).

There are no provisions in the statute which indicate an intent on the part of the legislature to authorize the "governing body," (Section 99.020, RSMo Supp. 1967) in this case the city to restrict or limit the powers of such authority either by the adoption of the resolution declaring the need for such authority or thereafter.

The resolution or declaration, of course, has no greater standing than an ordinance; and an ordinance cannot be in direct conflict with statutory provisions. Wood v. City of Kansas City, 162 Mo. 303, 62 S.W. 433 (1901). Ordinances in conflict with prior or subsequent state statutes relating to governmental matters are required to yield. Carson v. Oxenhandler, 334 S.W.2d 394 (Mo. App. 1960). Where matters are of state concern though local in their operation, the state retains control, State v. City of St. Louis, 318 Mo. 870, 2 S.W.2d 713 (Mo. en Banc 1928).

It has been held by our courts that the General Assembly in the act under consideration declared the Housing Authority to be a municipal corporation, defined its purposes, declared them to be governmental functions, and declared the existence of an urgent necessity for its services. Larat Inv. v. Bickman, 134 S.W.2d 65 (en Banc 1939).

It is also clear that the powers of the housing authority are derived directly from the state and are not bestowed by the municipality. The housing authority is not a subordinate branch of the municipality's governing body, and not a municipal agent. City of Paterson v. Housing Authority of Paterson, 96 N.J. Super 394, 233 A.2d 98 (1967). After the city officials proceeding under the provisions of the Housing Law determine that such an independent corporation shall exist, all things thereafter done in relation to the authority are done under the provisions of the Housing Authority Law. State ex rel Great Falls Housing Authority v. City of Great Falls, 100 P.2d 915 (Sup. Mont. 1940).

Although we have been unable to find any Missouri or other

Honorable A. Basey Vanlandingham

authorities directly in point with the question that you pose, it is our view that the holdings of the cases cited dealing with the nature and purposes of the Housing Authority Law lead us to the conclusion that the City of Kirksville does not have the power to create a "limited housing authority."

CONCLUSION

It is therefore the opinion of this office that Sections 99.010 to 99.230 of the Revised Statutes of Missouri, "The Housing Authorities Law", authorizes cities to determine and declare the need for a housing authority upon a finding that insanitary or unsafe inhabited dwelling accommodations exist in such city or that there is a shortage of safe or sanitary dwelling accommodations in such city available to persons of low-income at rentals they can afford. The cities have no authority to declare a need for a limited housing authority under the provisions of the Housing Authorities Law.

The foregoing opinion, which I hereby approve, was prepared by my assistant John C. Klaffenbach.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", with a stylized, flowing script.

JOHN C. DANFORTH
Attorney General

Answer by letter-Patten

March 19, 1970

OPINION LETTER NO. 206

Honorable Joe D. Holt
State Representative
District No. 102
829 Center Avenue
Fulton, Missouri 65251



Dear Representative Holt:

This letter is in response to your request for an opinion on the following question:

"May funds received by the City . . . from the Motor Vehicle Fuel Tax under the Provisions of Article IV, Section Thirty (a) of the Constitution of Missouri, adopted March 6, 1962, be used for the payment of principle and interest on bonded indebtedness incurred since the effective date of said Constitutional amendment [sic] for the repair or construction of streets within the City?"

The aforementioned constitutional section, in subparagraph 2, states that the money is to be used:

". . . solely for construction, reconstruction, maintenance, repair, policing, signing, lighting and cleaning roads and streets and for the payment of principal and interest on indebtedness incurred prior to the effective date of this section on account of road and street purposes, and the use thereof being subject to such other provisions and restrictions as provided by law. . . ." (Emphasis Added)

Honorable Joe D. Holt

The rule of construction to be followed in this case is that words used in the constitution are presumed to have been employed in their natural and ordinary meaning and no forced or unnatural construction is to be placed upon them. State ex rel. Randolph County v. Walden, 357 Mo. 167, 206 S.W.2d 979 (1947).

This office has previously issued an opinion, Opinion No. 223 to the Honorable John M. Dalton, June 12, 1962, in which this office stated that a municipality may not issue revenue bonds payable from that municipality's share of the proceeds of the aforementioned gasoline tax. It is the position of this office that the reasoning in the prior opinion mentioned here is dispositive of your question, and a city may not use its proceeds from the gasoline tax for the payment of principle and interest on indebtedness incurred after the effective date of Section 30(a), Article IV of the Missouri Constitution. This section clearly states that it may only be used to pay principle and interest on indebtedness incurred prior to the effective date of the constitutional section, March 6, 1962. No other provisions of the constitution give a city the power to pay indebtedness incurred after the aforementioned date out of such funds.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 223
6-12-62, Dalton

BANKS:
BRANCH BANKS:
TRUST COMPANIES:

The establishment of an office by a bank and trust company separate and apart from its main banking facility at which its trust officers are available to the public constitutes the establishment of a branch and the establishment of such a branch is not permitted under Section 362.105.

Opinion No. 207

May 15, 1970



Mr. C. W. Culley, Commissioner
Division of Finance
Department of Business and Administration
Jefferson State Office Building
Jefferson City, Missouri 65101

Dear Mr. Culley:

This official opinion is in response to your recent request for a ruling with regard to the facts set forth in your recent inquiry which reads as follows:

"May a state chartered bank be permitted to open a trust office should that bank have full trust powers, separate and apart from its main banking building and, if so, would such office be construed as a branch or facility? This office would be operated for the bank's customers, their attorneys, life insurance underwriters to consult with the bank's trust officers. All legal trust activities, records such as accounts, such as the assets and disbursements of funds would still be performed within the main bank building together with the safety deposits of the customers."

Your opinion request is written in terms of a chartered bank which has full trust powers. I assume, therefore, that you are referring to a bank which has applied for and obtained the authority granted under 362.115, RSMo 1959, as amended. This section permits a bank organized under the laws of Missouri to apply for and obtain the authority to exercise:

Mr. C. W. Culley

". . . any part or all of the fiduciary powers now or hereafter granted under the laws of this state to trust companies. . . ."

In determining whether the applicant is qualified to exercise the trust powers provided for in Section 362.115 the Commissioner of Finance is to determine among other things:

"(1) The needs of the community for fiduciary services and the probable volume of such fiduciary business available to the bank;

(4) The nature of the supervision to be given to the fiduciary activities, including the qualifications, experience and character of the proposed officer or officers of the trust department;"

Where a bank has obtained the authority granted under 362.115 it may conduct the activity set forth in 362.105 2. which provides ". . . every trust company created under the laws of this state shall be authorized and empowered to:

"(1) Receive money in trust; . . .

"(2) Accept and execute all such trusts and perform such duties of every description as may be committed to them . . . and to accept and execute all such trusts and perform such duties of every description as may be committed or transferred to them by order, judgment or decree of any courts; . . .

"(6) Act as trustee, executor, administrator, guardian, or in any other like fiduciary capacity;"

362.105 2 is applicable to trust companies. 362.105 1 is applicable to "every bank and trust company" created under the laws of Missouri. By Paragraph (1) of this section, the powers of these institutions are limited by the following proviso:

". . . provided, however, that no bank or trust company shall maintain in this state a branch bank or trust company, or receive

Mr. C. W. Culley

deposits or pay checks except in its own banking house or as provided in section 362.107;"

The question then which your opinion request raises is whether the activities described constitute the operation of a branch bank or trust company within the meaning of Section 362.105 1 (1).

It has long been the policy of the State of Missouri to regulate the banking business. In Lucas v. Central Missouri Trust Co., 162 S.W.2d 569, 577 (Mo. S.Ct., En Banc, 1942) the Court stated:

" . . . The banking business is coupled with great public interest. It is subject to strict regulation, visitation and supervision. . . ." loc. cit. 162 S.W.2d 569, 577.

In regulating banks and trust companies, the legislature has evidenced a strong concern with regard to the location at which the business of a bank and trust company is to be carried out and the number of offices it may operate.

Prior to 1967, the activities and organization of trust companies was regulated under Chapter 363. A trust company was prohibited from maintaining a branch trust company by Section 363.170. In 1967 Chapter 363 was repealed and a number of the provisions contained therein were incorporated in Chapter 362. The prohibition against branch trust companies which appeared in 363.170 was incorporated in 362.105 and is now contained in the proviso quoted above.

From the opinion request it would appear that the office described in your letter is not intended to "receive deposits or pay checks" so that that portion of the proviso governing these activities is not involved in this opinion request. The prohibition against branch banking was relaxed somewhat in 1959 when the legislature through Section 362.107 permitted banks to establish drive-in facilities. The facility described therein is to be established for the convenience of the automobile driving public. There are a number of limitations imposed upon a facility established under this section which includes a limitation upon the services which may be performed. The permitted services are:

" . . . checks may be paid, deposits received, deposits withdrawn and change made only."

Mr. C. W. Culley

It seems apparent that the office to be established under the facts that you present is not intended to be a facility established pursuant to the provisions of Section 362.107. The functions to be performed are, of course, not in compliance with the functions which a drive-in bank is permitted to perform under the language quoted above. Further, there is no indication that the office is to be located within 1000 yards of the main banking facility which is required by 362.107 2. (2) (b).

Therefore, if the proviso in Section 362.105 1. prohibits the establishment of this office, the prohibition must be found in that portion of 362.105 which provides:

" . . . that no bank or trust company shall maintain in this state a branch bank or trust company,"

There is one further observation to be made with regard to the proviso. The prohibition is written in terms of several prohibited activities connected with "or". "Or" has been defined in Missouri as:

"Ordinarily used as a disjunctive to mean 'either' as 'either this or that'."

Norberg v. Montgomery. 173 S.W.2d 387, 390, (Mo. S.Ct., En Banc, 1943).

Thus, the proviso prohibits the establishment of a branch bank or branch trust company in general terms along with the specific prohibition with regard to the receipt of deposits or payment of checks. That the legislature chose to specifically mention two particular activities which in the prohibition is probably the result of the historic importance of these two types of activities in the banking industry.

Thus, it is apparent that the prohibition in the Missouri statute is not to be viewed as running against only the specific functions mentioned. See First National Bank v. Dickinson, ____ U.S. ____, 24 L.Ed.2d 312, 320, 90 S.Ct. ____ (1969).

Since there is no specific definition of "branch" in the statutes, it is helpful to examine the related statutes to determine the policy underlying the restriction imposed by the proviso.

The organization of banks and trust companies in Missouri is governed by Chapter 362. Under 362.020 1. (2) the articles of agreement submitted to the Commissioner of Finance for the purpose of establishing a bank or trust company are to include:

Mr. C. W. Culley

"(2) The name of the city or town and county in this state in which the corporation is to be located;"

Section 362.035 provides that a certificate evidencing incorporation is to be issued by the Commissioner if he determines that the bank or trust company was organized according to law. In 1959 this section was amended to require that all certificates issued subsequent to August 29, 1959 designate the address and location in the city or town at which the corporation is to conduct its business until the address is changed with the approval of the Commissioner having first been obtained.

Similarly, where a bank or trust company seeks to restate its articles of agreement under 362.042 and said restated articles are prepared and submitted in the approved form, the Commissioner is to issue a restated certificate of incorporation and is to designate the address and location in the city or town at which the corporation is authorized to conduct its business.

Before issuing a certificate under 362.035, the Commissioner is to examine the articles of agreement submitted and under 362.030 1. the Commissioner is to determine, inter alia, that the "convenience and needs of the community to be served justify and warrant the opening of the bank or trust company therein. . . .". Similarly, where a bank or trust company seeks to amend its charter under 362.325 to change its location the Commissioner is to ascertain "whether the convenience and needs of the new community wherein the bank desires to locate are such as to justify and warrant the opening of the bank therein. . . ."

As the 1959 amendment to 362.035 indicates the legislature has been increasingly concerned with the location of banks and the change of location of established banks. Prior to the reorganization of Chapters 362 and 363 in 1967, Section 363.060, applicable to trust companies, contained the same language as Section 362.035 including the language added by the 1959 amendment. In State ex rel. Bank of Nashua v. Holt, 156 S.W.2d 708 (Mo. S.Ct., 1941) the court discusses at length the statutory provisions dealing with the relocation of a bank under the general banking laws of 1927 and of 1941. The discussion of the applicable statutes in this case makes clear that the trend in Missouri has been to restrict the discretionary power of a bank to change its location.

From the foregoing, it is apparent that the legislature has evidenced substantial interest in the location or relocation of a bank. In either event, the Commissioner is to determine the effect of the location of the banking institution in the community where it is proposed to be located.

Mr. C. W. Culley

The statutory scheme through which the location of banks or trust companies is controlled when coupled with the prohibition against the establishment of branch banks or trust companies authorizes the Commissioner to control the location and relocation of each facility in the State of Missouri. If, of course, banks or trust companies may open one or more offices to conduct the activity described in the opinion request then the banking commissioner would not have the authority to regulate the location of such new outlets.

The question stated narrowly is whether a bank and trust company may establish an office apart from its main banking facility through which its trust officers consult with and advise its trust clients and their representatives where all legal trust activities including custodial and record keeping services are maintained at the main facility.

A "branch" is defined in Webster's Third New International Dictionary, 1961, as:

"A subordinate or dependent part of a central system or organization (a branch bank in a suburb)."

As the example in the dictionary indicates, the office to be established is a branch according to this definition. It is obviously dependent upon the main resources of the bank and is a part of the central organization of the bank. From the facts provided it seems reasonable to infer that where property which is to serve as the corpus of a trust under Section 362.105 2. (1) is received, the res is to be physically located at the central banking facility. Although the opinion request does not describe in detail the specific activities which are to be performed at the new office, it would appear that the administration of the trust is to be performed at the main facility. Typically, this would involve the investment and reinvestment of assets, the maintenance of records, the disbursement of funds from the corpus, and the receipt and distribution or retention of interest or returns on the trust corpus.

In determining whether a bank should be permitted to exercise the fiduciary powers granted a trust company, the commissioner is to determine whether the applicant bank has sufficient personnel to exercise the fiduciary powers. Section 362.115 3 requires that the Commissioner ascertain the character and ability of the management, the qualifications experience and character of the trust officers; and whether the bank has legal counsel available to advise upon fiduciary matters. Thus, the counsel and advice of the trust officers at the new office would be performing for their clients a substantial portion of the duty normally considered to be a part of the operation of a trust department of a bank.

Mr. C. W. Culley

In State ex rel. Barrett v. First National Bank of St. Louis, 249 S.W. 619 (Mo. S.Ct., En Banc, 1923) the court was called upon to determine whether a national bank engaged in business in Missouri was authorized to establish and conduct a branch bank in Missouri under the National Bank Act. The predecessor to Section 362.105 provided that no bank shall maintain a branch bank. The National Bank Act did not contain such a provision and the court was called upon to decide whether the Missouri prohibition was applicable to a bank organized under the National Bank Act. The case is of some assistance in determining the purpose underlying the prohibition. In determining whether the words "an office or banking house" which appeared in the National Bank Act should be construed as allowing banks in several locations, the court stated:

" . . . If followed, it would, instead of centralizing and rendering more stable the powers of a bank, enable it, by multiplying its places of business, to subdivide and at the same time extend its powers in such manner as to stifle competition. . . ." loc. cit. 249 S.W. 619, 621.

And again, in determining whether the establishment of multiple banks was within the incidental powers of a bank, the court stated:

" . . . The apparent purpose for the establishment of branch banks is to multiply the places of business of the principle bank and thereby increase the volume of same. . . ." loc. cit. 249 S.W. 619, 622.

It would appear, therefore, that the establishment of multiple places of business was viewed by the court as a basic reason underlying the prohibition against branch banks.

In Goldy v. Crane, 445 P.2d 212 (Colo. S.Ct., En Banc, 1968) a substantive test for determining whether a bank is a "branch" was described as follows:

" . . . it must be shown that the alleged branch is doing business with the alleged parent in the same way as if the institutions were one; and, it must be shown that 'the unitary type of operation' which is the hallmark of a branch bank is present." loc. cit. 445 P.2d 212, 214.

Mr. C. W. Culley

In First National Bank in Billings v. First Bank Stock Corp., 306 F.2d 937 (C.A. 9, 1962) quoted in the Goldy case the court stated:

"They must show, that, in substance, Midland is doing business through the instrumentality of Valley, or vice versa, in the same way as if the institutions were one." loc. cit. 306 F.2d 937, 942.

It seems apparent that the trust business of the main banking facility is to be conducted through the new office. It is reasonable to infer that the new location will be utilized by the bank's clientele as a source of information and advice obviating the necessity of visiting the main banking facility.

From the foregoing, it seems clear that the office to be established is a branch. It is a satellite office operated for the convenience of its trust clientele and their representatives. It serves to allow the bank and trust company to multiply the locations at which it may conduct its business, while retaining at its main facility most of the administrative functions associated with corporate trustees. To the public which it seeks to serve, the trust offices located at the branch will provide the personal contact and advice now provided at its main facility. As State ex rel. Barrett v. First National Bank of St. Louis, supra, indicates multiple offices is precisely the evil at which the prohibition against branch banking was intended to operate.

Furthermore, in conjunction with the prohibition against the establishment of branch banks or trust companies, Chapter 362 contains numerous provisions regulating the location and relocation of banks and trust companies. It is hardly likely that the General Assembly would have regulated the location and relocation of these institutions with such care if it intended to permit these institutions to establish numerous locations.

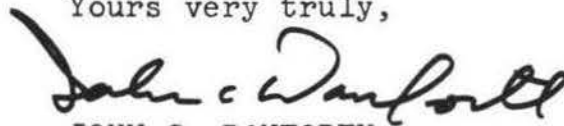
CONCLUSION

It is our opinion that the establishment of an office by a bank and trust company separate and apart from its main banking facility at which its trust officers are available to the public constitutes the establishment of a branch and the establishment of such a branch is not permitted under Section 362.105.

Mr. C. W. Culley

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Craft.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is written in a cursive style with a large, sweeping initial "J".

JOHN C. DANFORTH
Attorney General

SCHOOLS:
STATE AID:

General Assemblies meeting subsequent to the regular session of the Seventy Fifth General Assembly are not required to make any of the appropriations stated in Sec-

tions 149.010, 149.020, 149.030, 163.031, 163.036 and 163.161 enacted by the Seventy Fifth General Assembly and referred to as the School Foundation Law prior to making any appropriations for purposes lower in priority than the support of public schools as listed in Section 36, Article III, Missouri Constitution. The General Assembly must still comply, however, with Section 3 (b), Article IX of the Missouri Constitution requiring that at least twenty-five percent of the state revenue be appropriated annually for the support of the free public schools.

April 2, 1970

OPINION NO. 209

Honorable William Baxter Waters
State Senator - 17th District
First National Bank Building
Liberty, Missouri 64068



Dear Senator Waters:

This letter is in response to your request for an opinion on the following question:

If there are insufficient funds to fully comply with Sections 149.010, 149.020, 149.030, 163.031, 163.036, and 163.161 enacted by the Seventy Fifth General Assembly and referred to as the School Foundation Law, and the General Assembly cannot appropriate for the schools the dollar amounts required by those sections, must the General Assembly, in light of Section 36, Article III of the Missouri Constitution listing the priorities of appropriations to be made of state funds, fully comply with the aforementioned School Foundation Law before appropriating other funds for purposes lower in priority as listed in Section 36 of Article III?

A prior opinion of this office to the Honorable Richard H. Ichord, March 19, 1958, No. 44, is dispositive of a portion of your question. In that opinion, which is enclosed for your reference, this office held that it is not necessary that all appropriations

in a category of Section 36, Article III of the Constitution of Missouri must be made before any appropriation in any succeeding category can be made. As stated in Opinion No. 44 (Opinion 44, supra, page 5), the "real purpose of the constitutional provision is to prevent a General Assembly from making appropriations in the lower categories and failing to make appropriations in the preceding ones."

It should be noted that neither Section 36, Article III, nor Opinion No. 44 make mention of specific dollar amount appropriations. However, the School Foundation Law purports to require that specific dollar amounts be appropriated for the State School Moneys Fund. For example, in subsection 7 of Section 163.031, it is stated that in the fiscal year 1969-1970, \$234,000,000 be transferred by the General Assembly to the State School Moneys Fund, less the amount derived from the tax on cigarettes provided for in Section 149.020. After mentioning specific amounts for other years, the aforementioned subsection states that the General Assembly shall increase the amount transferred to the State School Moneys Fund in the preceding fiscal year by at least \$35,000,000 annually for the fiscal years 1970-71, 1971-72, and 1972-73. Thus, the School Foundation Law purports to make certain dollar requirements on the General Assembly in passing appropriations for public education. In addition, subsection 4 of Section 163.031 states:

"4. No district shall receive annually, during the biennium beginning in 1969, or thereafter, a less amount per pupil in average daily attendance from the state foundation program fund than it received in 1968-69 from the state appropriation for transportation allowance, special education, flat grant aid, first level equalization, second level equalization and teacher preparation aid."

This indicates that specified dollar amounts must be appropriated every year by the General Assembly for the School Foundation Law.

Attention is called to the fact that Section 163.031 sets forth methods for computing amounts to be transferred to the State School Moneys Fund both during the biennium beginning in 1969 and during succeeding years. The question then arises, does a present General Assembly have the power to require future General Assemblies to make specific appropriations? In the opinion of this office to Honorable William R. Nelson, dated February 1, 1954 (enclosed for your reference), this question was answered in the negative. In State ex rel. Fath v. Henderson, 160 Mo. 190, 60 S.W. 1093 (1901), upon which the aforementioned opinion was based, the Missouri Supreme Court stated:

"Let it be freely admitted that one General Assembly can not tie the hands of its successor, and that although this tax is set apart into a special fund, it still belongs to the State and may be appropriated to another and different use, . . ." Id. at 214.

The fund referred to in Henderson was a fund created from the proceeds of an inheritance tax for the use of the State University.

Having decided that a present General Assembly cannot bind future General Assemblies, of what effect are the aforementioned provisions of the School Foundation Law that purport to require specific appropriations by succeeding General Assemblies? Assuming that the General Assembly does not act futilely, and that the General Assembly is aware of its own limitations, the aforementioned statutes can only be expressions of hope by the present General Assembly that subsequent General Assemblies will follow the recommendations contained therein. However, as stated above, these recommendations are in no way binding on future General Assemblies. As the Legislature did not intend that the School Foundation Law bind future Legislatures, it would be inconsistent with this intent to assume that the Seventy Fifth General Assembly desired to bind itself in subsequent special sessions.

This leaves only the provisions of Section 3, Article IX of the Missouri Constitution, to set forth the minimum amounts that must be appropriated by any General Assembly for the support of free public education in the state. That section requires that at least twenty-five percent of the annual state revenue be so appropriated. Because future General Assemblies are not required to appropriate any of the amounts expressed in the School Foundation Law, General Assemblies can certainly make appropriations for purposes lower in priority than the support of public schools, as listed in Section 36, Article III of the Missouri Constitution, before appropriating the full amounts stated in the School Foundation Law.

CONCLUSION

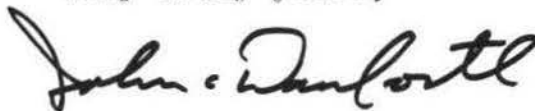
Therefore, it is the conclusion of this office that General Assemblies meeting subsequent to the regular session of the Seventy Fifth General Assembly are not required to make any of the appropriations stated in Sections 149.010, 149.020, 149.030, 163.031, 163.036 and 163.161 enacted by the Seventy Fifth General Assembly and referred to as the School Foundation Law prior to making any appropriations for purposes lower in priority than the support of public schools as listed in Section 36, Article III, Missouri Constitution. The General Assembly must still comply, however, with

Honorable William Baxter Waters

Section 3 (b), Article IX of the Missouri Constitution requiring that at least twenty-five percent of the state revenue be appropriated annually for the support of the free public schools.

This opinion, which I hereby approve, was prepared for me by my assistant, Thomas L. Patten.

Very truly yours,

A handwritten signature in cursive script, reading "John C. Danforth".

JOHN C. DANFORTH
Attorney General

Enclosures:

Op.No. 44, Ichord, 3-19-58
Nelson, 2-1-54

SCHOOLS ELECTIONS:
ELECTIONS:
BALLOTS:
REGISTRATION:

1. When school elections are held in conjunction with any general, primary or special election pursuant to the requirements of Section 111.-111, Senate Bill No. 134, 75th General

Assembly, the procedure for handling voted ballots, poll books and tally sheets after the polls have closed is set forth in Sections 111.531, 111.551, 111.561, 111.571, 111.581 and 111.591, V.A.M.S., Senate Bill No. 134, 75th General Assembly. 2. Pursuant to the requirements of Section 162.361, Senate Bill No. 136, 75th General Assembly, all school elections conducted in school districts containing a city having not less than 10,000 or more than 50,000 inhabitants should be conducted in such city in accordance with the laws regulating the registration of voters within such city. Qualified voters of such a school district residing outside the corporate limits of the city shall sign an affidavit as to their residency within the school district as required by Section 162.361.

OPINION NO. 210

June 2, 1970

Honorable Thomas R. Gilmore
Prosecuting Attorney
Scott County
217 South Kingshighway
Sikeston, Missouri 63801



Dear Mr. Gilmore:

This official opinion is issued in response to your request for a ruling on the following questions:

"The most pressing problem concerns how many Judges and Clerks may be designated by the County Clerk when we conduct a combined election as required by Section 111.111. As a matter of practical necessity, when we have a County election, School election and City election all combined at one polling place, we are going to have to have three sets of poll books. Do Sections 111.181 and 111.231 set minimums or could we designate additional Judges and Clerks where the County Court sees a practical necessity to do so in order to accommodate the combined elections?

"Our second question concerns receiving reimbursement from the cities and schools for a prorata share of the election expenses when

Honorable Thomas R. Gilmore

we have a combined election. It appears from reading the appropriate Statutes that the County Court is responsible, in the first instance, for paying these Judges and Clerks. It is our desire to bill the school districts and the city for their prorata share of this expense. Our question is whether there is any authority for the School Districts and the cities to pay these bills?

"Our next question concerns the interpretation of Section 111.111. It is my position that this Section applies only when you have a County or State general, primary, or special election. I have taken this position because the Section seems to indicate, in sub-section 1, that the provisions apply only when elections of two different types are held at the same time, using the following language 'Whenever any general, primary or special election and elections held by a school, fire or sewer district, municipality or other political subdivision are held on the same day.' A contrary position has been taken by another attorney and it is his feeling that this Section would apply in cases where a city election and a school election were being held on the same day but no other election being held that day. We would appreciate having your interpretation on this question.

"Our next question concerns the handling of election materials, including ballots, poll books, and tally sheets, in cases of joint elections. Section 111.551 directs that the poll books shall be 'directed on the outside to the Board of Election Commissioners, the County Clerk or City School District.' Other Statutes in this area refer to 'Election Commissioners or County Clerk.' This problem creates some concern because the Board of Education continues to have the responsibility of certifying the results of the School election.

"Another question that has arisen concerns registration in School elections. The City of Sikeston is a city in excess of 10,000 people and less than 50,000 people and for that reason

Honorable Thomas R. Gilmore

this School District seems to come within the purview of Section 162.361. Scott County is a local option registration County under Chapter 114. Section 114.240 provides that the Chapter applies only to State and County general, special and primary elections. For that reason, it would appear that applying the general registration Statutes pertaining to Scott County to the provisions of Sections 162.361 (2) would leave the School District in our area in a situation where registration is not required for School elections. We would appreciate hearing from you on this question."

I.

Enclosed herewith please find a copy of Opinion No. 199 dated March 4, 1970, to the Honorable Kenneth R. Babbitt. Reference should be made to the answer to Question 2 in Opinion No. 199 which we believe is responsive to your first question.

II.

Your second question, we believe, is answered by Opinion No. 181 dated May 18, 1970, to the Honorable M. C. Bauer which sets forth our conclusions on the payment of election expenses incurred on April 7, 1970.

III.

We are enclosing herewith Opinion No. 161 dated March 4, 1970, to the Honorable Floyd E. Lawson which, we believe, answers your third question concerning the interpretation of Section 111.111, V.A.M.S., Senate Bill No. 134, 75th General Assembly. Paragraph 1 of Section 162.371, V.A.M.S., Senate Bill No. 136, 75th General Assembly would govern the situation where a school district and city hold elections on the same day.

IV.

Your fourth question concerns the handling of poll books, tally sheets and ballots where a joint election is held pursuant to Section 111.111. Section 111.531, V.A.M.S., Senate Bill No. 134, 75th General Assembly, provides the method for preserving and classifying ballots after the polls have closed:

"2. Immediately after this proclamation is made, and before separating, the judges shall fold in two folds and string closely on a single

Honorable Thomas R. Gilmore

piece of flexible wire or cord all the ballots counted except those marked 'objected to,' 'defective' or 'rejected'. The ends of the wire or cord shall be tied in a firm knot and the knot sealed in such manner that it cannot be untied without breaking the seal. The ballots so strung shall be enclosed in an envelope, sack or other container on which shall be endorsed the name or number of the election district or precinct and the date of the election and shall be tied and sealed with official wax impression seals, to be provided for such purpose, in such a manner that it cannot be opened without breaking the seals.

"3. The ballots, together with the package containing the ballots marked 'objected to', 'defective', 'rejected' or 'spoiled', shall be returned to the office of the county clerk or board of election commissioners as the case may be."

If it is required that the voted ballots be returned in the ballot box used during the voting, the procedure for doing so is set forth in Section 111.561, V.A.M.S., Senate Bill No. 134, 75th General Assembly.

Section 111.551, V.A.M.S., Senate Bill No. 134, 75th General Assembly, sets forth the procedure for preserving poll books and tally sheets:

"The poll books shall be enclosed in an envelope, which shall then be securely sealed with sealing wax, or other adhesive material. Two of the judges of opposite politics or any two city school district judges shall write their names across every fold at which the envelope, if unfastened, could be opened. The poll books shall be placed in the sack or other container provided for this purpose. Each set of tally sheets shall also be signed by the election clerks and the judges of election, and they shall be enclosed in an envelope, securely fastened, sealed and signed in like manner. The envelopes shall be directed on the outside to the board of election commissioners, the county clerk or city school district. On the outside of every envelope shall be endorsed whether it contains the poll books or the tally sheets, and for what precinct and ward or township or city school district."

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The procedure for handling voted ballots, poll books, tally sheets and other election supplies is provided in Section 111.571, V.A.M.S., Senate Bill No. 134, 75th General Assembly.

"1. If the voted ballots are returned to the county clerk or board of election commissioners in the ballot boxes one of the judges of election shall take charge of the ballot boxes, and one of the judges representing the opposite political party shall receive and hold the key thereto. When sacks or other containers are used to hold the voted ballots one judge of election shall take charge of the package containing the ballots and the sack or other package containing the nonvoted ballots, and one judge representing the opposite political party shall take charge of the sack and other packages containing the sealed envelopes holding the poll books, tally sheets, unused election supplies, affidavits and other reports, and in jurisdictions having voter registration, the registration books.

"2. The two judges of opposite politics shall immediately upon completing the signing of the statements of the results of the canvass and tally sheets and the sealing of the ballot box, sack or other container, and the performance of all other duties in their respective polling place go together to the office of the county clerk or the board of election commissioners and deliver the ballots and returns to the county clerk or election commissioners, who shall keep their offices open until all of the ballots and returns have been received."

Paragraph 1 of Section 111.581, V.A.M.S., Senate Bill No. 134, 75th General Assembly, sets forth the duties of the county clerk on receipt of the voted ballots and other election supplies:

"1. The election commissioners, or county clerk, upon the receipt of a ballot box and the key thereto, or a sack or container containing ballots cast at the election shall note the condition of seal or stamp on the box or container and enter a statement of its condition upon a book kept for this purpose together with the name of the judge who returned the ballot box, and the name of the

Honorable Thomas R. Gilmore

judge who returned the key. The election commissioners or the county clerk, shall thereupon open the ballot box and other containers, remove the poll books containing the returns of the votes cast, and note upon the books their condition, and put them together with the voted ballots in a secure place, under lock and key, except that one of the pool books from each election district or precinct shall be available for public inspection."

Section 111.591, V.A.M.S., Senate Bill No. 134, 75th General Assembly, provides that ultimately all ballots shall be sealed in a package and returned to the county clerk or board of election commissioners to be preserved for a 12 month period.

Section 111.611, V.A.M.S., exempts school elections from the provisions of certain sections in Chapter 111. None of the sections set forth above are within the terms of Section 111.611. Furthermore, we find no specific provisions pertaining to the handling of election supplies in the statutes governing elections in six director school districts. We conclude, therefore, that the procedures set forth in Sections 111.531, 111.551, 111.561, 111.571, 111.581 and 111.591 pertaining to the handling of voted ballots, poll books and tally sheets after the polls have closed apply to school elections held in conjunction with any general, primary or special election pursuant to Section 111.111.

V.

Your fifth question concerns the application of registration laws to school elections. As you point out, Section 114.240, RSMo 1967 Supp., provides that the county option registration provisions of Chapter 114 apply to ". . . state and county general, special and primary elections and municipal elections of all kinds in cities having more than four hundred thousand inhabitants." Because the tax referendum issue was a statewide special election, the provisions of Chapter 114 applied to the conduct of the election on that issue. However, pursuant to paragraph 2 of Section 162.361, V.A.M.S., Senate Bill No. 136, 75th General Assembly, any school election held on April 7, 1970, within the City of Sikeston (a city having more than 10,000 but less than 50,000 inhabitants) should have been conducted in accordance with laws regulating registration of voters within the city. See Section 116.010, RSMo 1967 Supp. and Section 114.040(1), RSMo 1967 Supp.

Furthermore, it is the opinion of this office that all school elections conducted in a school district containing a city having not less than 10,000 nor more than 50,000 inhabitants should be

Honorable Thomas R. Gilmore

conducted in such city in accordance with the registration laws pertaining to the city. This conclusion is based on the following wording of paragraph 2 of Section 162.361:

"2. Except in counties governed by subsection 1, the board of education in every school district containing a city having not less than ten thousand nor more than fifty thousand inhabitants shall require that all school elections shall be conducted in accordance with the laws regulating the registration of voters and general elections within the city; and that qualified voters outside the corporate limits of the city, not required to register for general elections, shall sign an affidavit as to their residence within the school district.
... " [Emphasis added]

We do not believe that the emphasized wording of Section 162.-361 means that registration shall be used in school elections only when city elections are taking place which require registration to be used. It is our conclusion that the legislature intended that registration should apply to "all school elections" in this type of school district regardless of when they are conducted.

CONCLUSION

Therefore, it is the conclusion of this office that:

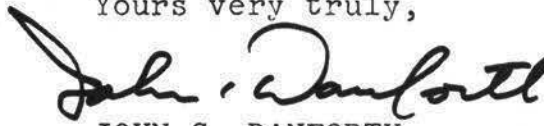
1. When school elections are held in conjunction with any general, primary or special election pursuant to the requirements of Section 111.111, Senate Bill No. 134, 75th General Assembly, the procedure for handling voted ballots, poll books and tally sheets after the polls have closed is set forth in Sections 111.531, 111.551, 111.561, 111.571, 111.581 and 111.591, V.A.M.S., Senate Bill No. 134, 75th General Assembly.

2. Pursuant to the requirements of Section 162.361, Senate Bill No. 136, 75th General Assembly, all school elections conducted in school districts containing a city having not less than 10,000 or more than 50,000 inhabitants should be conducted in such city in accordance with the laws regulating the registration of voters within such city. Qualified voters of such a school district residing outside the corporate limits of the city shall sign an affidavit as to their residency within the school district as required by Section 162.361.

Honorable Thomas R. Gilmore

The foregoing opinion, which I hereby approve, was prepared by my Assistant D. Brook Bartlett.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 199
3-4-70, Babbitt

Op. No. 181
5-18-70, Bauer

Op. No. 161
3-4-70, Lawson

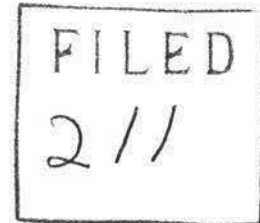
SCHOOLS:
TEACHERS:

The \$34,000 in additional school moneys, which the Macon School District R-I estimates it will receive from the state, may not be legally paid by the district to and among all teachers already under contract with the district for the 1969-1970 school year.

OPINION NO. 211

May 6, 1970

Honorable Ronald M. Belt
State Representative
District No. 96
State Capitol Building
Jefferson City, Missouri 65101



Dear Representative Belt:

This official opinion is issued in response to your request for a ruling on the designated questions arising out of the following fact situation:

"Macon School District R-I included in its budget for the 1969-1970 school year anticipated receipts from the State of Missouri under Mo.R.S. Section 163.031 in the then-estimated amount of \$220,000. On the budgeted-basis of such anticipated amount plus estimated funds from other sources, annual employment contracts were timely executed for said school year by this District with numerous teachers. Each of these employment contracts designated the position to be occupied by the teacher named, the cash amount of salary to be paid and the time period covered, without inclusion of any special provision.

"It now appears probable that for and during this school year this District will receive under said Section 163.031 the amount of \$254,000 instead of \$220,000. The District has fully complied with the eighty percent requirement under Paragraph 9 of Section 163.-031 and under Section 163.061, and also the Directors have ordered that all said moneys be placed in the teachers fund. The District Directors further desire to distribute presently during this 1969-1970 school year most of the aforesaid \$34,000 difference among all

Honorable Ronald M. Belt

of the teachers employed by said District by paying \$300.00 to each teacher, if such payment is legally permissible.

"It has been suggested that, by mutual consent between the District and each teacher, they may terminate each teacher's employment contract existing for this school year and in conjunction therewith execute a new employment contract covering only the balance of this school year and in each teacher's contract provide for a salary which would exceed by \$300.00 the amount otherwise payable to such teacher under such teacher's existing contract for such balance of this school year. The new contract would not provide for any different service by or position for any teacher nor for any employment time period beyond the existing contract expiration date.

"Questions: May the aforesaid \$34,000 be legally paid by the District to and among all the teachers employed as aforesaid by said District during this 1969-1970 school year? If so, by what method, e.g., by substitution of new employment contract as above-mentioned or in some other manner?"

Article III, Section 38(a) provides in part as follows:

"The general assembly shall have no power to grant public money or property, or lend or authorize the lending of public credit, to any private person, association or corporation, excepting aid in public calamity. . . ."

A school board has only those powers conferred on it by the General Assembly. Therefore, if the constitution prohibits the General Assembly from taking certain action, a school board can have no greater power. Kizior v. City of St. Joseph, 329 S.W.2d 605, 609 (Mo. 1959).

Here, the school board has an employment contract with the teachers in question obligating the teachers to perform certain services. For these services, the school board has agreed to pay a specific cash salary. Now, without altering in any manner the nature of the teacher's obligation, the school board proposes to pay each teacher an additional \$300 for these same services. We

Honorable Ronald M. Belt

believe this amounts to a "grant of public money" to a private person in violation of Article III, Section 38(a). Relying in part on the predecessor to Article III, Section 38(a), this office has previously determined that a school district may not pay a bonus to a teacher when said bonus is not provided by a contract (Opinion No. 16, dated April 23, 1938). Also, we have previously decided that a school board may not make a donation or gift to a school teacher during the term of the contract (Opinion No. 21, May 10, 1939). In the instant case, the board proposes to pay each teacher, regardless of length of service or amount of salary, the same amount, i.e., \$300. This payment, too, could be classified as a "bonus," a "gift" or a "donation."

Furthermore, Article III, Section 39(3), Missouri Constitution 1945, prohibits the granting of extra compensation to public officers or agents after a contract has been entered into and performed in whole or part. Section 39(3) of Article III provides that:

"The general assembly shall not have power:

* * *

"(3) To grant or to authorize any county or municipal authority to grant any extra compensation, fee or allowance to a public officer, agent, servant or contractor after service has been rendered or a contract has been entered into and performed in whole or in part; . . ."

In the instant case, we have a proposal "to grant extra compensation" to school teachers "after a contract has been entered into and performed in whole or in part." Whether this provision applies to the instant situation depends on whether school districts are included within its coverage. In other words, is the General Assembly prohibited from authorizing a school board to grant extra compensation to one of its agents after a contract has been performed in whole or in part? The answer to this question depends on whether a school district is a "county or municipal authority."

Even though school districts are not referred to expressly, we believe that, in view of the laudatory purpose of this provision and in view of the liberal construction given similar language by the Supreme Court of Missouri, school districts are included within the coverage of Article III, Section 39(3).

The purpose underlying Article III, Section 39(3) has been described as follows by the Supreme Court of Missouri in its opinion in Kizior v. City of St. Joseph, supra:

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". . . Section 39(3), Article III was adopted by the people as a safeguard against the squandering of public money and to prohibit public officers from giving gratuities to contractors, and it may not be cast aside even though one who has acted in good faith may suffer hardships. The courts of this state have adhered to a policy of strictly enforcing the constitutional and statutory safeguards applicable to the contracts of public corporations. *Likes v. City of Rolla*, 184 Mo.App. 296, 167 S.W. 645; *Webb-Boone Paving Co. v. State Highway Commission*, 351 Mo. 922, 173 S.W.2d 580; *Donovan v. Kansas City*, 352 Mo. 430, 175 S.W.2d 874. . . ." Id. at 610.

The Supreme Court has generally adopted a broad definition of "municipal corporation" in interpreting other provisions of the Missouri Constitution. For instance, in interpreting the provisions of Article X, Section 6, Missouri Constitution 1875, which provided that "all property . . . of the state, counties and other municipal corporations . . . shall be exempt from taxation . . .", the Missouri Supreme Court, in *State ex rel. Caldwell v. Little River Drainage Dist.*, 291 Mo. 72, 236 S.W. 15 (1921), stated:

"The statutes of this state under which drainage districts are organized declare them to be public corporations. Because of their inherent nature and because of the purposes for which primarily they are created, we have repeatedly held that they are not private corporations in any sense; that they are political subdivisions of the state, and exercise prescribed functions of government. *Mound City Land & Stock Co. v. Miller*, 170 Mo. 240, 253, 70 S. W. 721, 60 L. R. A. 190, 94 Am. St. Rep. 727; *Morrison v. Morey*, 146 Mo. 543, 561, 48 S. W. 629; *Drainage District v. Turney*, 235 Mo. 80, 90, 138 S. W. 12. We have also said that they are municipal corporations. *Wilson v. Drainage District*, 257 Mo. 266, 286, 165 S. W. 734; *State v. Taylor*, 224 Mo. 393, 469, 123 S.W. 892. In its strict and primary sense the term 'municipal corporation' applies only to incorporated cities, towns, and villages, having subordinate and local powers of legislation. *Heller v. Stremmel*, 52 Mo. 309. But in the larger and ordinarily accepted sense the term is applied to any public local corporation,

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exercising some function of government, and hence includes counties, school districts, townships under township organization, special road districts and drainage districts. Wilson v. Trustees of Sanitary District, 133 Ill. 443, 464, 27 N. E. 203; Rathbone v. Hopper, 57 Kan. 240, 242, 45 Pac. 610 34 L. R. A. 674. . . ." Id. at 16. [Emphasis supplied]

In the case of Laret Inv. Co. v. Dickmann, 345 Mo. 449, 134 S.W.2d 65 (En Banc 1939), the court referred again to the broad definition of "municipal corporation":

"The term 'municipal corporation' is sometimes used in a strict sense to designate a corporation possessing some specified power of local government. In a broader sense it includes public, or quasi public, corporations designed for the performance of an essential public service. See Dillon on Municipal Corporations, Fifth Ed. Sec. 32.

"This court has adopted the broader definition. In State ex rel. Caldwell v. Little River Drainage District, 291 Mo. 72, loc. cit. 79, 236 S.W. 15, loc. cit. 16, we said: 'In its strict and primary sense the term "municipal corporation" applies only to incorporated cities, towns, and villages, having subordinate and local powers of legislation. Heller v. Stremmel, 52 Mo. 309. But in the larger and ordinarily accepted sense the term is applied to any public local corporation, exercising some function of government, and hence includes counties, school districts, townships under township organization, special road districts and drainage districts.'

"See also State ex rel. Kinder v. Little River Drainage District, 291 Mo. 267, 236 S.W. 848; Grand River Drainage District v. Reid, 341 Mo. 1246, 111 S.W.2d 151; State ex rel Caldwell v. Little River Drainage District, 291 Mo. 72, 236 S.W. 15; Harris v. William R. Compton Bond Co., 244 Mo. 664, 149 S.W. 603.

"The broad definition of a municipal corporation requires that it be formed for the purpose of performing some governmental function. . . ." Id. at 68.

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Also, in Russell v. Frank, 348 Mo. 533, 154 S.W.2d 63 (1941), the court, in ruling on the validity of a school tax under the provisions of Article X, Section 11, Missouri Constitution 1875, stated:

"Appellants also contend that even though this tax be not for building purposes it is authorized under the general powers of the legislature to levy taxes for state purposes non-municipal in their nature. An elaborate argument, with the citation of many authorities, is made to sustain this point. It will be unnecessary to analyze all of the cases cited because the argument is squarely opposed to the express language of the constitutional provision here involved. The section above cited imposes a special and specific limitation on school taxes. The tax in this case was levied not by the state but by the school district, which is and was a municipal corporation as we have defined that term in Laret Investment Co. v. Dickmann, 345 Mo. 449, 134 S.W.2d 65. The very purpose for which such municipal corporation is created is that of the maintenance of a school system. . . ." Id. at 67.

In City of Olivette v. Graeler, 338 S.W.2d 827 (Mo. 1960), the court reiterated its reliance on the broad definition of "municipal corporation":

"Characterizing St. Louis County as a 'municipal corporation' does not necessarily determine that its land area is incorporated within the meaning of a particular statute. The same word, term or phrase may vary in meaning depending on the time, place and circumstances under which it is used. In Towne v. Eisner, 245 U.S. 418, 38 S.Ct. 158, 159, 62 L.Ed. 372, the Supreme Court speaking through Mr. Justice Holmes stated: 'But it is not necessarily true that income means the same thing in the Constitution and the Act. A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.'

"'In its strict and primary sense the term "municipal corporation" applies only to incorporated cities, towns, and villages, having

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subordinate and local powers of legislation.
* * * But in the larger and ordinarily accepted sense the term is applied to any public local corporation, exercising some function of government, and hence includes counties, school districts, townships under township organization, special road districts and drainage districts.' State ex rel. Caldwell v. Little River Drainage Dist., 291 Mo. 72, 236 S.W. 15, 16. See also Laret Investment Co. v. Dickmann, 345 Mo. 449, 134 S.W.2d 65, 68[2]; St. Louis Housing Authority v. City of St. Louis, 361 Mo. 1170, 239 S.W.2d 289, 294 [12-15]; and McQuillin, Municipal Corporations, 3rd Ed., Vol. I, § 2.03 et seq.

"Many public agencies, rendering services of a municipal nature for which a corporate form of organization is provided by law, may properly be included in the category on 'municipal corporations' in the broader sense. To those mentioned in the Caldwell case could be added county health departments and hospitals, fire districts and, notably in St. Louis County, the Metropolitan St. Louis Sewer District, 'a body corporation, a municipal corporation and a political subdivision of the state' which encompasses both the area in question and the City of Olivette. The territory which these 'municipal corporations' occupy does not ipso facto become an incorporated area within the meaning of the annexation statutes." Id. at 835.

The General Assembly has also on occasion classified a school district as a "municipal corporation." Section 432.070, RSMo 1959, states that "[n]o county, city, town, village, school township, school district or other municipal corporation shall . . ." [Emphasis supplied].

Article III, Section 39(3) refers to "municipal authority," not "municipal corporation." However, we believe that "municipal authority" is not as specific a term as "municipal corporation" and, therefore, a broad interpretation of its meaning is equally warranted.

In Watts v. Levee Dist. No. 1, Mississippi County, Mo., 164 Mo.App. 263, 145 S.W. 129 (St.L.Ct.App. 1912), the plaintiff sought to have certain warrants of the levee district declared void. In

Honorable Ronald M. Belt

determining whether estoppel would lie against the district, the court stated:

" . . . Certainly no estoppel should be adjudged against them but on clear and unmistakable proof of acts of ratification and acquiescence, done within the line of their powers and duties. The directors of these levee districts have no power to impose any obligations on the district unless first authorized to do so by vote of the land-owners of the district. They are quasi-public officers, officers of 'a public governmental corporation.' Our Constitution, section 48, article 4, provides that the General Assembly itself, the supreme lawmaking power of the state, shall have no power to grant, or to authorize any county or municipal authority to grant, any extra compensation to a public officer, agent, servant or contractor, 'after service has been rendered or a contract has been entered into and performed in whole or in part, nor pay, nor authorize the payment of any claim hereafter credited against the state or any county or municipality of the state under any agreement or contract made without express authority of law and all such unauthorized agreements or contracts shall be null and void.' While this constitutional prohibition does not literally cover the class of officers or public agencies to which these drainage districts belong, it would seem that its spirit should cover them, and that spirit is against the allowance or payment for public work, services or labor of any kind done in the first instance without authority of law, as was the case here." Id. at 134.

Consistent with the court's conclusion in the Watts case, we do not believe that the people of Missouri intended only to prohibit counties and municipalities, in the narrow sense of the word, from increasing the compensation of an agent for services he is already legally obligated to perform. We believe that Article III, Section 39(3) was intended as a broad prohibition against such action by any public, local corporation which is entrusted with public moneys. Therefore, we conclude that "municipal authority" as used in Article III, Section 39(3) includes school districts.

Having so determined, the school board cannot increase the compensation paid to teachers presently under contract for the 1969-1970 school year. This same conclusion was reached by the Missouri

Honorable Ronald M. Belt

Supreme Court in Kizior v. City of St. Joseph, supra. The city had entered into an exclusive contract with a private corporation for the collection of garbage for a ten year period at a specific sum. An attempt was made, after partial performance, to increase the compensation paid by the city for precisely the same services which the contractor was already obligated to perform. The court, after quoting Article III, Section 39(3), stated:

"A careful reading of the amendatory contract does not disclose that appellant agreed therein to do anything except 'to continue to collect and dispose of garbage in accordance with the contract [of July 12, 1949] hereinabove referred to.' Obviously, appellant was already bound to do that which it agreed to do in the agreement to amend. The stated purpose of the city in agreeing to the amendment was to make it possible for appellant to continue the garbage collection operation which appellant had found it impossible to do 'by reason of conditions beyond its control.' For doing that which appellant was already obligated to do under the original contract, the city agreed in the amendment to pay appellant at least \$19,000 annually in addition to the amount originally agreed upon. That clearly violated the quoted constitutional provision, as it was a 'grant' of 'extra compensation * * * to a * * * contractor after * * * a contract has been entered into and performed * * * in part.' Article III, Section 39(3), supra. For analogous cases, see Sager v. State Highway Commission of Missouri, 349 Mo. 341, 160 S.W.2d 757, and Spitcaufsky v. State Highway Commission of Missouri, 349 Mo. 117, 159 S.W.2d 647[2]." Id. at 609.

Any argument in favor of a conclusion different from the one reached herein must rely on Section 168.111, RSMo 1967 Supp. as being legislative authorization for rescinding the current contract and entering into a new one at a higher salary. Subparagraph 6 of Section 168.111, RSMo 1967 Supp. provides in part as follows:

"A teacher's contract may be terminated at any time by mutual consent of the teacher and the board. . . ."

An argument can be made that this authorization is intended solely to allow the termination of a teacher's employment by mutual agreement, thereby avoiding the restrictions on unilateral termination contained in the previous subparagraphs of Section 168.111

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and in Section 168.121, RSMo 1967 Supp. Furthermore, subparagraph 2 states that a teacher's "reemployment is subject to the regulations hereinafter set forth." No authority is granted to the board to reemploy teachers for the current year during the current year. Nevertheless, assuming that the legislature intended subparagraph 6 of Section 168.111 to permit a contract to be terminated and another entered into having the same terms and conditions but providing for more monetary compensation, such an interpretation would be in conflict with Article III, Section 38(a) and Article III, Section 39(3) and, therefore, beyond the power of the General Assembly to enact.

CONCLUSION

It is, therefore, the opinion of this office that the \$34,000 in additional school moneys, which the Macon School District R-I estimates it will receive from the state, may not be legally paid by the district to and among all the teachers already under contract with the district for the 1969-1970 school year.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, D. Brook Bartlett.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 16
4-23-38, Chamier

Op. No. 21
5-10-39, Dawson

AGRICULTURE:
RULES AND
REGULATIONS:

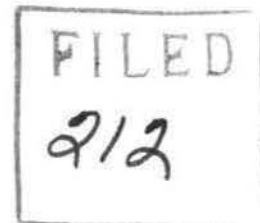
Pursuant to Section 196.886(1), RSMo 1959, no person, firm, association or corporation shall manufacture and sell ice cream and related frozen food products in containers unless each con-

tainer shall bear the name of the manufacturer on the body or lid of such container, and that the Department of Agriculture is not authorized to promulgate a regulation which would allow a code number or other technical symbol to be placed on the container instead of the name of the manufacturer.

April 21, 1970

OPINION NO. 212

Mr. Dexter D. Davis, Commissioner
Missouri Department of Agriculture
Jefferson State Office Building
Jefferson City, Missouri 65101



Dear Mr. Davis:

This is in response to your request for an official opinion on the question which you submitted as follows:

"The Department of Agriculture has promulgated a regulation stating that, 'All multiple plant companies using a single address must identify each package as to the licensed plant where it was frozen. A code or symbol filed with the Department can accomplish this purpose.'

"I would like to know it if would be permissible for the Department of Agriculture to change the above quoted regulation so to allow persons to use a code number to identify the name of the manufacturer as well as the location of the plant, instead of writing out the name of the manufacturer and using a code number for the address of the plant as is now done."

Section 196.886, RSMo 1959, to which you refer in your opinion request provides in part as follows:

Mr. Dexter D. Davis

"No person, firm, association or corporation shall:

"(1) Manufacture and sell ice cream, and related frozen food products defined in sections 196.851 to 196.895 in containers unless each container shall bear the name of the manufacturer on the body or lid of such container; or

* * * *

"(5) Sell or offer for sale at retail any product defined in sections 196.851 to 196.895 from a fountain, cabinet, or counter, unless there is conspicuously displayed at, on or over the fountain, cabinet, or counter where such product is dispensed, a sign of such form and size as may be prescribed by regulations made by the department of agriculture and which sign shall be legible to the purchaser and shall state the name of the manufacturer of such product;"

It is to be observed that twice in the same section the legislature has directed that the "name of the manufacturer" be displayed in a manner that will enable it to be seen and identified by the purchaser without difficulty. The legislature is presumed to have intended what it has stated directly and unambiguously, and courts may not under the guise of construction, add to or take from the clear and definite terms of a statute. *State v. Pilkinton*, 310 S.W.2d 304-309 (Spr.Ct.App. 1958). Where the language of a statute is plain and unambiguous, there is nothing to construe. *United Air Lines v. State Tax Commission*, 377 S.W.2d 444 (Mo. en banc 1964).

The Department of Agriculture is an administrative agency created by the legislature. Section 261.010, RSMo 1959. Like other administrative agencies, it does not have any jurisdiction or authority except that which the legislature has conferred upon it. *Soars v. Soars-Lovelace, Inc.*, 142 S.W.2d 866 (Mo. 1940). The legislature has conferred upon the Department of Agriculture the authority to make rules and regulations. However an administrative agency, by the adoption of rules and regulations, cannot change the legal meaning of a statute.

An administrative agency must interpret the law as it reads. *State ex rel. St. Louis Public Service Co. v. Public Service Commission*, 34 S.W.2d 486 (Mo. en banc 1930). If an administrative agency did not follow the clear language of a statute but by some theory of construction, attempted to impose its own ideas about

Mr. Dexter D. Davis

what it considered best to promote the general welfare, it would be indulging in administrative legislation and invading the province of the legislative branch of the government or of the electorate in amending the law.

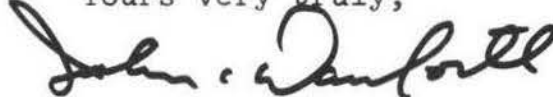
Substitution of a code number for the name of the manufacturer on the body or lid of the container of frozen food products would insert a technical phrase to establish the identity of the manufacturer. If this technical means of identification had been intended by the legislature, it surely would have used language to express such intention. Accordingly, the Department of Agriculture must accept Section 196.886(1) as the legislature wrote it and its meaning is definite and beyond fair debate.

CONCLUSION

It is the opinion of this office that pursuant to Section 196.886(1), RSMo 1959, no person, firm, association or corporation shall manufacture and sell ice cream and related frozen food products in containers unless each container shall bear the name of the manufacturer on the body or lid of such container, and that the Department of Agriculture is not authorized to promulgate a regulation which would allow a code number or other technical symbol to be placed on the container instead of the name of the manufacturer.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, L. J. Gardner.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being more prominent.

JOHN C. DANFORTH
Attorney General

RELIGION: The Division of Mental Health may employ
MERIT SYSTEM: persons who have education or experience in
MENTAL HEALTH: Divinity and Theology regardless of whether
or not they are ordained ministers to act as
pastoral counselors under the supervision of and as required by
licensed physicians and so long as such persons do not espouse a
religion or perform sacerdotal functions in their employment there
is no violation of the provisions of the Missouri Constitution
which prohibit support of any priest, preacher, minister or teacher
as such. Such counselors as employees of the Division of Mental
Health and under the Department of Public Health and Welfare are
required to be under the classified merit system.

OPINION NO. 213

May 7, 1970

George A. Ulett, M.D., Director
Division of Mental Health
P.O. Box 687
Jefferson City, Missouri 65101



Dear Dr. Ulett:

This opinion is in response to your question concerning whether persons having education in the areas of Divinity or Theology and who may or may not be ordained ministers of various faiths may be employed by the Division of Mental Health as pastoral counselors in situations where a psychiatrist determines that pastoral counseling and assistance is beneficial and a necessary part of the patient's treatment process. You also inquire whether such persons would be under the classified merit system.

We held in our Opinion No. 356, dated September 30, 1969, to Waits, that the Constitution of Missouri prohibits public funds from being used to employ a full-time chaplain for a county jail. We are enclosing a copy of that opinion which sets out in detail the constitutional provisions upon which that ruling was based. In that respect, we relied principally upon the provisions of Section 7, Article I, of the Constitution which provides:

"That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship." (Emphasis added)

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It is clear that the above provision does not bar a priest, preacher, minister or teacher of religion from public service or from receiving public funds when he is not employed in the capacity of a minister and when he is not being paid to preach, distribute sacraments, or to perform other sacerdotal or sectarian functions.

We recognized in our Opinion No. 164, dated June 2, 1966, to Wheeler, that membership in the ordained clergy or in a religious order does not prevent a qualified person from being lawfully employed as a teacher of secular subjects in a public school. We also enclose a copy of that opinion.

Similarly, in our Opinion No. 354, dated December 19, 1968, to Morton, copy enclosed, we held that an agency of the state government may be authorized by the legislature to contract and cooperate with private medical schools for the purpose of training Missourians in the medical profession and that the mere fact that a medical school may be affiliated with or a part of a sectarian institution does not in and of itself preclude its participation in such a contract.

Further, in our Opinion No. 157, dated June 25, 1963, to Traywick, we held that it is permissible for regular faculty members of a state college to teach academic courses about religion as a part of the curriculum of a state supported college. And, in our Opinion No. 313, dated November 21, 1968, to Curtis, we held that a state college or university may establish courses, a division or department of religion for the purpose of teaching about religion as distinguished from the teaching of religion, and that such courses must maintain strict religious neutrality as defined by the courts. We have also enclosed copies of these opinions.

We are also of the opinion that members of religious orders are not precluded from wearing religious garb while teaching or in other similar occupations in the absence of a statute or regulation to the contrary. Moore v. Board of Education, 212 N.E.2d 833, 4 Ohio Misc. 257 (1965). And, we know of no such prohibition with respect to the wearing of religious garb under these circumstances in this state.

The fact that a person has received some theological education or, as we have stated, even though he may in fact be ordained does not preclude him from occupying a position that does not promote his religious faith or views. Clearly such employment would be prohibited if such a person did, as a part of his job, espouse or proselyte a religion or religious activities.

It is our understanding that the mental health area has peculiar demands not only upon the qualified physicians who are responsible for the treatment of the patients in hospitals but also

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upon all the supporting personnel who are concerned with resolving conflicts and symptoms that evolve around the needs of the patients. Not the least of these are often the spiritual concerns of the patients and the no doubt large number of mentally ill persons who experience religious aberrations which must be dealt with in treatment.

We understand that pastoral counselling is often an important aspect of treating mentally disturbed people, and that such counselling does not entail preaching, performing sacerdotal functions or teaching religion. Therefore, a person employed as a pastoral counselor is not employed as a priest, preacher, minister or teacher of religion as such.

In answer to the second part of your question, we believe that such positions must be classified merit system positions under the provisions of Paragraph 1 of Section 191.070, RSMo 1959, which states:

"All employees of the department of public health and welfare, except the department director, the division directors and one secretary for each director, chaplains, patients or inmates of state charitable institutions who may also be employees in such institutions, and persons employed in an internship capacity as a part of their formal training leading to an academic degree, shall be selected in accordance with the state merit system law, notwithstanding that such office, position, or employment may be specifically exempted under the state merit system law. Such employees shall be persons of good character and integrity and residents of this state for one year, except that residence in this state shall not be necessary in cases of appointment of physicians, nurses, technicians, dietitians, and other professionally trained personnel."

In view of our holding in Opinion No. 356, 1969, cited above, prohibiting the employment of a full-time chaplain in the Jackson County Jail, it follows that "chaplains" cannot, as such, be employed by the state.

As we have stated, the position of pastoral counselor in offering pastoral type services not espousing any religion is not considered the employment of a "chaplain" under Section 191.070.

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Such a position therefore necessarily comes within the merit system and such employees must be classified under the merit system provisions.

CONCLUSION

It is, therefore, the opinion of this office that the Division of Mental Health may employ persons who have education or experience in Divinity and Theology, regardless of whether or not they are ordained ministers, to act as pastoral counselors under the supervision of and as required by licensed physicians and so long as such persons do not espouse a religion or perform sacerdotal functions in their employment there is no violation of the provisions of the Missouri Constitution which prohibit support of any priest, preacher, minister or teacher as such. Such counselors as employees of the Division of Mental Health and under the Department of Public Health and Welfare are required to be under the classified merit system.

The foregoing opinion, which I hereby approve, was prepared by my assistant John C. Klaffenbach.

Very truly yours,



JOHN C. DANFORTH
Attorney General

Enclosures:

Opinion No. 164, 6/2/66, Wheeler
Opinion No. 354, 12/19/68, Morton
Opinion No. 157, 6/25/63, Traywick
Opinion No. 313, 11/21/68, Curtis
Opinion No. 356, 9/30/69, Waits

CITIES, TOWNS & VILLAGES:
ROADS & BRIDGES:
CITY STREETS:

A fourth class city which makes
street improvements and repairs
under Section 88.703, RSMo 1969,
can defray, by proper ordinance,

out of general revenue the cost of said improvements or repairs
which abutts city owned property, and that all other street im-
provements and repairs under Section 88.703 must be paid for pro-
portionately by the abutting property owners.

OPINION NO. 215

August 7, 1970

Honorable Donald L. Manford
State Senator, District 8
9409 Oakland Avenue
Kansas City, Missouri 64138



Dear Senator Manford:

This is in reply to your request for an opinion of this office
dealing with a fourth class city, in which you ask:

" . . . Can the city defray any portion of street
improvements and/or repairs as opposed to asses-
sing the abutting property owners for the full
value of same excepting the creation of those
public improvements provided for in Section
88.677 and 88.697?"

It is our understanding that your question is whether street
improvements and repairs under Section 88.703, RSMo 1969, can be
paid for out of city funds or whether the cost of such improvement
and repairs must be paid proportionately by the abutting property
owners.

Section 88.703, RSMo 1969, provides:

"No formality shall be required to authorize
the repairing of sidewalks, or of street or
other paving, curbing, guttering, macadamizing
or part thereof, or reconstructing the same,
and making assessments therefor; but the proper
officer or committee on improvements may, with-
out notice, cause such work to be done, keeping
an account of the cost thereof, and reporting
the same to the board of aldermen for assess-
ment; and each lot or piece of ground abutting
on such sidewalk, street, avenue, or alley,
or part thereof, shall be liable for its part

Honorable Donald L. Manford

of the cost of any work or improvement provided for in sections 88.700 and 88.703, done or made along or in front of such lot or piece of ground as reported to the board of aldermen, and all lands, lots and public parks owned by any county or city, and all other public lands, all cemeteries, owned by public, private or municipal corporations; provided, that nothing in this section shall be construed to authorize any assessment against any cemetery lot, and all railroad rights-of-way fronting or abutting on any of said improvements shall be liable for their proportionate part of the cost of such work and improvements, and tax bills shall be issued against said property as against other property, and any county or city that shall own any such property shall out of the general revenue funds pay any such tax bill, and in any case where the county or city or railroad company shall fail to pay any such tax bill, the owner of the same may sue such county, city or railroad company on such tax bill and be entitled to recover a general judgment against such county, city or railroad company. Any of said improvements to be paid for by such city may be paid for by said city out of the general revenue funds if the council so desires, but all such work and improvements shall be paid for with special tax bills unless the proceedings of the city for the same specify that payment will be made out of the general revenue funds of said city. The board of aldermen may provide a penalty for failure to pay such special tax within a given time, and any tax bills issued in payment of such repairs shall constitute a lien upon the property liable therefor until paid. All costs for building and constructing sidewalks shall be paid to the contractor therefor, in special tax bills assessed against the abutting property liable therefor, and such tax bills shall constitute a lien upon such property until paid, and shall bear interest at eight percent per annum from the date of issue except as provided in section 88.693."

In Barton County Rock Asphalt Co. v. City of Fayette, (Mo.App.) 155 S.W.2d 771, in construing Section 7210, RSMo 1939 [now Section

Honorable Donald L. Manford

88.703, RSMo 1969], the court held generally that under such statute providing for improvement, paving and repairing of streets of fourth class cities, a city council has the power to improve its streets, but does not have the power to defray the costs thereof out of general revenue funds, except as to the portions of property abutting city-owned property:

"Section 7060, R.S.Mo. 1929, Rev.St.1939, § 7210, provides, in part, that no formality shall be required to authorize the repair of any street paving, curbing, guttering, macadamizing, or the reconstruction of same, and making special assessments therefor, that all costs thereof, shall be borne proportionately by the abutting property, including that of any city owned property; and that tax bills shall be issued therefor. It provides, however, that any of said improvements to be paid for by the city (that is, the proportionate part of the cost to be borne by any city owned property) 'may be paid for by said city out of the general revenue funds if the council so desires,' but not ' * * * unless the proceedings of the city for the same specify that payment will be made out of the general revenue funds of said city.' . . .

* * *

". . . The sections summarized herein provide a very complete scheme for the opening, improvement and maintenance of public streets. The powers of the city are clearly limited and defined therein. It may lay out and open public streets, alleys, and highways within the city, and it may pay the cost of opening, improving, and repairing same as follows:

"(a) The cost of opening, laying out, and grading, and for building bridges, culverts, public sewers and footwalks across same, may be paid from general revenues.

"(b) For gravelling, rocking, macadamizing, paving, and the reconstruction or repair of such streets as have been gravelled, rocked, macadamized or paved, the cost must be paid proportionately by abutting property owners, except where a bond issue has been voted for the purpose as follows:

Honorable Donald L. Manford

"1. On property owned by a person other than the city, by special assessments and tax bills levied against the property;

"2. On property owned by the city it may be paid by issuance of tax bills, or, under certain circumstances, it may be paid out of the general revenues.

"We therefore hold that defendant lacked the power to order the improvement of its streets, in the manner that they were improved, and to pay therefor out of general revenue funds.
... ." (loc. cit. 773-774)

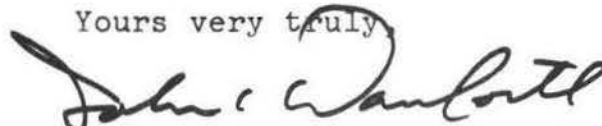
Under the holding of the court in such case, it is clear that expenditures out of the city's general revenues under Section 88.703, RSMo 1969, can be made only on improvements to be paid for by the city, that is, on street improvements or repairs along or in front of lands, lots, public parks and all other public lands owned by the city and that the cost of all other street improvements and repairs under Section 88.703 must be paid proportionately by the abutting property owners.

CONCLUSION

It is, therefore, the conclusion of this office that a fourth class city which makes street improvements and repairs under Section 88.703, RSMo 1969, can defray, by proper ordinance, out of general revenue the cost of said improvements or repairs which abutts city owned property, and that all other street improvements and repairs under Section 88.703 must be paid for proportionately by the abutting property owners.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Kenneth L. Romines.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Answer by letter-Bartlett

July 31, 1970

OPINION LETTER NO. 216



Honorable Frank L. Mickelson
State Representative
District No. 110
Freeman, Missouri 64746

Dear Representative Mickelson:

This is a reply to your letter of February 27, 1970, in which you requested the opinion of this office on the validity of Ordinance 69-438.

Last year you requested an opinion on the validity of Belton City Ordinance 69-394. This office held, in Opinion Letter No. 302, September 24, 1969, Mickelson, that this ordinance was unconstitutional because it did not purport to regulate all used car lots in the City of Belton. It applied only to those used car lots not operated in conjunction with new car sales. Specifically, the ordinance was held to be (1) an unreasonable and discriminatory classification; and (2) a special law in a situation where a general law could have been made applicable. We also concluded that Belton had the power to regulate used car dealers and that such regulation was intended to protect the safety and general welfare of the inhabitants. The application of the ordinance to a limited group of used car dealers was the sole basis for finding the ordinance unconstitutional.

Ordinance 69-438, referred to in your present letter, makes the terms of the earlier ordinance applicable to all used cars lots. The pertinent part of Ordinance 69-438 reads as follows:

"Section 1. AMENDMENT: Ordinance No. 69-394 is hereby amended by deleting Section 1 in its entirety and substituting in its place and stead the following:

Honorable Frank L. Mickelson

"Section 1. AUTHORITY: Sections 79.470 M.R.S. as amended and 94.270 M.R.S. as amended, authorizes the City of Belton to establish norms and requirements which shall apply to the location and operation of used vehicle lots in the City of Belton."

Section 1 of Ordinance 69-394 which is amended by Ordinance 69-438 was written as follows:

"Section 1. AUTHORITY: Sections 79.470 M.R.S. as amended and 94.270, M.R.S. as amended, authorizes the City of Belton to establish norms and requirements which shall apply to the location and operation of used vehicle lots in the City of Belton which are not operated in conjunction with new car vehicle sales."
(Emphasis ours)

Because Ordinance 69-438 extends the coverage of Ordinance 69-394 to all used car lots, the basis of our objection to the constitutionality of Ordinance 69-394 has been removed.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. Letter No. 302
9-24-69, Mickelson

CIRCUIT CLERKS:

Pursuant to the provisions of Section 55.220, RSMo 1959, the circuit clerk in second class counties is required to file with the county auditor a monthly statement showing all moneys and fees received by him by virtue of his office and all sums paid by him, to whom paid and for what purpose regardless of the source of such funds or of the persons entitled to receive payment.

OPINION NO. 217

May 1, 1970

Honorable William S. Brandom
Prosecuting Attorney
Clay County Court House
Liberty, Missouri 64068



Dear Mr. Brandom:

This is in response to your request for an official opinion regarding an interpretation of Section 55.220, RSMo 1959, which is as follows:

"The clerk of the circuit court, on the last secular day of each month, shall file with the auditor a full and complete statement of all moneys and fees received by him by virtue of his office and of all sums by him paid out and to whom paid and for what purpose."

It is our understanding that the question to be considered is whether such statute requires the clerk to file a statement of all money, including that belonging to the public and that belonging to individuals when it is deposited with the clerk in his official capacity.

Under the provisions of Section 483.025, RSMo 1959, the clerk is required to give bond, and this section provides that "the bond shall be conditioned that he will faithfully perform the duties of his office, and pay over all moneys which may come to his hands by virtue of his office,"

In State v. Callaway, 237 S.W. 173 (Mo. App.) the court said on page 175:

"When, therefore, the defendant clerk bound himself faithfully to perform the duties of said office according to law, he assumed, among other obligations, one

Honorable William S. Brandom

requiring him to pay over all money coming to his hand by virtue of his said office. State ex rel v. Moore, 74 Mo. 413, 41 Am. Rep. 322. . . ."

In the same case, the court said on page 176:

"The remaining question for our solution is whether the funds in question were received by defendant Callaway in his official capacity as clerk of the circuit court of Cass county, or whether he merely became bailee of the fund. If the former, he may be held liable as an insurer of the fund, but, if the latter, he may be held only in case he was negligent in the handling of the same.

"It is admitted that the fund in question passed into the hand of defendant clerk by order of the court. It was received by him by virtue of said order and deposited in the bank (since defunct) to his credit as clerk of said court, together with other funds that came into his hands as such clerk.

"Having decided that the judgment of the court in the bill of interpleader case cannot be collaterally attacked and that it must stand as to strangers to the action, we hold that the funds came into the hands of defendant clerk in his official capacity. . . ."

It is to be observed that the statute makes no distinction between public and private moneys. The clerk is recognized as the custodian of all moneys, whether public or private, paid into court and he is bound to safely keep them and pay them out pursuant to law or deliver them to his successor.

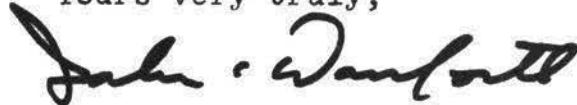
CONCLUSION

It is the opinion of this office that pursuant to the provisions of Section 55.220, RSMo 1959, the circuit clerk in second class counties is required to file with the county auditor a monthly statement showing all moneys and fees received by him by virtue of his office and all sums paid by him, to whom paid and for what purpose regardless of the source of such funds or of the persons entitled to receive payment.

Honorable William S. Brandom

This opinion, which I hereby approve, was prepared by my Assistant, L. J. Gardner.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

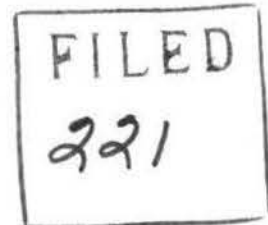
JOHN C. DANFORTH
Attorney General

SHERIFFS: Sections 57.407 and 57.409, V.A.M.S., S.B. No.
COMPENSATION: 165, 75th General Assembly, require that sheriffs
of third and fourth class counties pay all fees
collected by them after October 13, 1969, in civil matters into the
county treasury regardless of whether such fees were for services
by them or their predecessors in office prior to such date.

OPINION NO. 221

June 16, 1970

Honorable Haskell Holman
State Auditor
Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Holman:

This opinion is in response to your request which is stated
as follows:

"Paragraph 3 of Section 57.407 states:

'3. In counties of the third class after
October 13, 1969, the sheriff shall pay all
fees collected by him in civil matters, and
which were previously retainable by him,
into the county treasury, except charges
for each mile traveled, allowable to him,
which he may retain, in serving civil pro-
cess.'

"Paragraph 3 of Section 57.409 states:

'3. In counties of the fourth class after
October 13, 1969, the sheriff shall pay
all fees collected by him in civil matters,
and which were previously retainable by
him, into the county treasury, except char-
ges for each mile traveled, allowable to
him, which he may retain, in serving civil
process.'

"Question No. 1:

Honorable Haskell Holman

Are sheriffs of third and fourth class counties entitled to retain civil fees earned on or prior to October 13, 1969 but which fees were not collected and received by them until after October 13, 1969?

"Question No. 2:

Would ex-sheriffs, whose tenure in office terminated on any date prior to the effective date of paragraph 3 of Section 57.407 and 57.409, be entitled to receive and retain civil fees earned by them but which were not collected until after October 13, 1969?"

In our view the provisions of Sections 57.407 and 57.409, V.A.M.S., clearly require that such sheriffs pay all fees collected in civil matters into the county treasury; and therefore, both questions presented must be answered in the negative.

CONCLUSION

It is the opinion of this office that Sections 57.407 and 57.409, V.A.M.S., S.B. No. 165, 75th General Assembly, require that sheriffs of third and fourth class counties pay all fees collected by them after October 13, 1969, in civil matters into the county treasury regardless of whether such fees were for services by them or their predecessors in office prior to such date.

The foregoing opinion, which I hereby approve, was prepared by my assistant John C. Klaffenbach.

Yours very truly,



JOHN C. DANFORTH
Attorney General

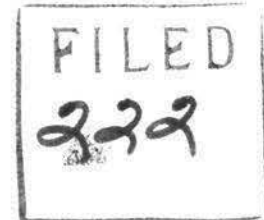
MERIT SYSTEM:

With respect to establishment of cafeterias and charging for meals to employees in institutions under the merit system that the Personnel Division has no authority to establish charges for such meals but that the appointing authorities do have the authority to determine whether meals will be furnished to employees and to determine the charge for such meals which is to be, with some exceptions, related to the actual cost of such meals to the state.

Opinion No. 222

September 28, 1970

Mr. Norris F. Steenberger
Director, Personnel Division
Department of Business and
Administration
P. O. Box 388
Jefferson City, Missouri 65101



Dear Mr. Steenberger:

This letter is in response to your opinion request in which you ask the following questions with respect to meal charges to employees of the various departments within the merit system:

- "(1) Does the Personnel Division have authority to establish such meals charges as a part of the Pay Plan? If so, does such schedule of charges apply only in instances where the Appointing Authorities require employees to eat at the institution?
- "(2) Do the Appointing Authorities have the prerogative of providing Cafeterias and setting their own food rates as a convenience for employees who choose to eat on the premises but still retain freedom of choice as to whether or not they eat their meals at the Hospital Cafeteria?"

Section 36.140, RSMo 1969, states in full as follows:

"After consultation with appointing authorities and the state fiscal officers, and after a public hearing, the director shall prepare and recommend to the board a pay plan for all classes subject to this law. Such pay plan shall include, for each class of positions, a minimum

Mr. Norris F. Steenberger

and a maximum rate, and such intermediate rates as the director considers necessary or equitable. In establishing such rates, the director shall give consideration to the experience in recruiting for positions in the state service, the rates of pay prevailing in the locality for the services performed, and for comparable services in public and private employment, living costs, maintenance, or other benefits received by employees, and the financial condition and policies of the state. Such pay plan shall take effect when approved by the board and the governor, and each employee appointed to a position subject hereto after the adoption of the pay plan shall be paid at one of the rates set forth in the pay plan for the class of positions in which he is employed; provided, that the state comptroller certifies that there are funds appropriated and available to pay the adopted pay plan. The pay plan shall also be used as the basis for preparing budget estimates for submission to the legislature insofar as such budget estimates concern payment for services performed in positions subject hereto. Amendments to the pay plan may be recommended by the director from time to time as circumstances require and such amendments shall take effect when approved as provided herein. The conditions under which employees may be appointed at a rate above the minimum provided for the class, or advance from one rate to another within the rates applicable to their positions, shall be determined by the regulations."

It seems clear that Section 36.140 authorizes the Personnel Director to give consideration to "other benefits received by employees" but does not authorize either the Director or the Personnel Advisory Board to establish meal charges for meals furnished by the appointing authorities. Further, we find no statutes vesting the Director of Personnel or the Personnel Advisory Board with the authority to establish meal charges for employees of the various institutions under the merit system.

It is our view that whether meals are made available to employees and the charges to be made for such meals are matters to be determined by the appointing authorities subject, of course, as the case may be, to the approval of the officer having the statutory policy and operational control.

Mr. Norris F. Steenberger

In answer to your second question, it is our view that the appointing authorities do have the prerogative of providing a cafeteria and setting food rates as a convenience for employees who choose to eat on the premises but who still retain the freedom of choice as to whether or not they eat their meals at such cafeteria.

In reaching this conclusion, we have taken into consideration, among other things, statutes such as Section 191.150, RSMo 1969, and Section 191.160, RSMo 1969, which relate to the Department of Public Health and Welfare.

That is, Section 191.150 provides:

"Any purchase of food in any institution under the control of the department of public health and welfare, other than the usual quality purchased for the inmates thereof, to be used by or for anyone other than the inmates of said institution shall be charged directly to the individual responsible for said purchase."

Section 191.160 provides:

"The department of public health and welfare may provide any employee in any institution under its control with board and living quarters in addition to salary, or wages, when the director shall determine that it is for the best interest of the state to do so."

Our conclusion is then, that, in the absence of an express prohibition, the appointing authorities may furnish meals to employees under the merit system at least at a figure that reflects the actual cost to the state.

CONCLUSION

It is, therefore, the opinion of this office with respect to establishment of cafeterias and charging for meals to employees in institutions under the merit system that the Personnel Division has no authority to establish charges for such meals but that the appointing authorities do have the authority to determine whether meals will be furnished to employees and to determine the charge for such meals which is to be, with some exceptions, related to the actual cost of such meals to the state.

Mr. Norris F. Steenberger

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Klaffenbach.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a prominent "D".

JOHN C. DANFORTH
Attorney General

CORPORATIONS NOT-FOR-PROFIT: Corporations organized under Chapters
USURY: 352, RSMo (pro-forma decree) and 355,
RSMo (general not-for-profit) can not
interpose defense of usury, nor can
they sue for and recover allegedly
usurious interest under Section 408.050,
RSMo 1959.

OPINION NO. 223

March 26, 1970

Honorable Vance R. Frick
Prosecuting Attorney
Adair County
213 West Washington
Kirksville, Missouri 63501



Dear Mr. Frick:

This official opinion is issued in response to your request in which you ask about the applicability of Missouri's usury statutes (see generally Chapter 408, RSMo) to corporations organized under Chapter 352, RSMo (Religious and Charitable Corporations organized pursuant to pro-forma decree) or Chapter 355, RSMo (General Not-For-Profit Corporations).

Section 408.060, RSMo 1959, treats of usury as a defense and provides as follows:

"Usury may be pleaded as a defense in civil actions in the courts of this state, and upon proof that usurious interest has been paid, the same, in excess of the legal rate of interest, shall be deemed payment, shall be credited upon the principal debt, and all costs of the action shall be taxed against the party guilty of exacting usurious interest, who shall in no case recover judgment for more than the amount found due upon the principal debt, with legal interest, after deducting therefrom all payments of usurious interest made by the debtor, whether paid as commissions or brokerage, or as payment upon the principal, or as interest on said indebtedness; provided, however, that no corporation shall, after this section takes effect, interpose the defense of

usury in any such action, nor shall any bond, note, debt, contract or obligation of any corporation or any security therefor, be set aside, impaired or adjudged invalid by reason of the rate of interest which the corporation may have paid or agreed to pay hereon." (Emphasis supplied)

The provision relating to corporations was added by Laws 1935, p. 267. At this time the statutory provision defining the powers of business corporations (Section 5030, RSMo 1939), had no provision with regard to the rate of interest on corporation obligations, similar to what is now contained in Section 351.385, RSMo Supp. 1967. The first special mention of authorized interest rates in the business corporation statutes was added in 1943 (Laws 1943, p. 410, section 4).

Nothing in the language of Section 408.060 would exclude any type of corporation, organized under any provision of the Missouri statutes. Nor would there be any basis for excluding corporations of other states which enter into loan transactions governed by Missouri law. The statute makes no distinction among types of corporations, nor does it concern itself with the profit-making or non-profit aspect.

There remains the possibility that a corporation organized under Chapter 352 or 355 might be denied the defense of usury, but still might be able to sue for and recover usurious interest pursuant to Section 408.050, RSMo 1959. It is true that this latter section has no specific language which says that a corporation may not bring an action in accordance with its terms. In *Brierley v. Commercial Credit Co.*, 43 F.2d 724, 728 (E.D. Pa. 1929), however, it was held that a similar statute denying a corporation the defense of usury also operated to preclude a suit to recover the usurious interest. The court said that there would be an absurdity in holding that a corporation could not use a claim of usury in total or partial defense when sued, but that it could immediately bring suit to recover the usurious interest which the court's judgment had forced it to pay. The court found, therefore, that the intent of the legislature was to authorize the payment of interest by corporations in excess of the rates which the law allowed individuals to pay. The opinion cites several other cases in support of its conclusion, and seems logical and well-reasoned. We believe that the Missouri courts would reach the same result.

We consider, therefore, that the effect of the 1935 statute was to deny corporations of all types the defense of usury, and to preclude actions by corporations for the recovery of usurious interest. The 1943 modifications of the business corporation statutes would serve to clarify the situation as to those corporations, but surely would not have the effect of giving other kinds of corporations right of action which did not exist under the prior law.

We deal only with bona fide corporate transactions. It is possible that there might be a loan in which the corporation is the ostensible borrower, but in which the transaction might be a cloak for a usurious loan to an individual. We do not interpret your request as presenting any inquiry along these lines and therefore do not discuss the problem.

CONCLUSION

Non-profit corporations organized under Chapters 352 and 355, RSMo can not interpose usury as a defense, nor can such corporations sue for and recover allegedly usurious interest under Section 408.050, RSMo.

The foregoing opinion, which I hereby approve, was prepared by my special assistant, Charles B. Blackmar.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being the most prominent.

JOHN C. DANFORTH
Attorney General

SCHOOLS:
ELECTIONS:

A six-director school district may
accept money donated to the district
by a dealer in bonds for the purpose

of defraying the cost of an election on the question of whether the
district should incur bonded debt.

OPINION NO. 225

July 20, 1970

Honorable Thomas A. Walsh
State Representative
District No. 52
1820A Warren Street
St. Louis, Missouri 63106



Dear Representative Walsh:

This official opinion is issued in response to your request
for a ruling on the following question:

"It has come to my attention that certain school
districts in Missouri are holding school bond
elections, the cost of which are paid for by
the companies dealing in these bonds.

"I would like to have your opinion as to the
legality of a school district accepting money
from a dealer in bonds for the purpose of de-
fraying the cost of the election which autho-
rized their issuance."

For the purposes of this opinion, we assume that the money is
donated by the dealer in bonds to the district for the purpose of
financing in whole or part an election on a proposition to incur
bonded indebtedness. You have furnished no facts from which it
could be assumed that the payment of the election expenses by the
bond dealer is in exchange for an agreement by the school board
to sell some or all of the bonds to the dealer. Therefore, we are
not taking a position on that situation. We assume that the only
incentive for the dealer paying money to defray the election ex-
penses is his desire to purchase some or all of the bond issue if
the voters approve the proposition. Based on these assumptions,
we interpret your question to be whether a six-director school dis-
trict may legally accept money from a dealer in school bonds to
defray the cost of an election at which a proposition to incur bonded
indebtedness is placed before the voters of the district.

A six-director district is expressly authorized by Section
165.011, RSMo 1967 Supp., to accept money donated to it for a speci-
fic purpose.

Honorable Thomas A. Walsh

" . . . Money donated to the school districts shall be placed to the credit of the fund where it can be expended to meet the purpose for which it was donated and accepted. Money received from any other source whatsoever shall be placed to the credit of the fund or funds designated by the board."

Just because the dealer in bonds may have a personal interest in having an election held and hopes that the voters will approve the proposition does not, in our opinion, legally void the express grant of power to the school board to accept money earmarked by the donor for a specific purpose. See Opinion No. 35, dated April 29, 1958, to Honorable Thomas D. Graham and Opinion Letter No. 245, dated March 27, 1970, to Honorable James Millan, which reach conclusions consistent with the foregoing.

Furthermore, we do not believe that the legality of the election would be affected in any way by the fact that a dealer in bonds contributed part or all of the money required to conduct it. In Tucker v. McKay, 131 Mo.App. 728, 111 S.W. 867 (St.L.Ct.App. 1908), plaintiff contested action taken at an annual school meeting in which it was voted to move the school house. After a favorable vote was received on the question of whether the school house should be moved, someone asked the board about providing the necessary funds for moving the school house. Whereupon, two of the voters present stated they would pay all of the expense of moving the school house and, on this promise, the question of procuring funds for that purpose by the district was dropped. Plaintiff challenged the decision and authorization to change the location of the school house on a number of grounds. One of his contentions was that no provision had been made to provide funds for the removal and, therefore, the action taken at the meeting was incomplete. The court disposed of this contention as follows:

"No provision was made by the district to provide funds for the removal, for this reason it is contended the vote to move was incomplete and did not authorize the defendant trustees to move the house to the new site. As no fund to move the house was provided for at the meeting, its removal cannot be made a charge to the district; but, as two of the voters present agreed to pay the expense of the removal, if the trustees are willing to incur the risk of the removal on that promise, we know of no reason why a court should enjoin the exercise of their faith in the premises, especially when, as in this case, it seems to be well founded." Id. at 868.

Honorable Thomas A. Walsh

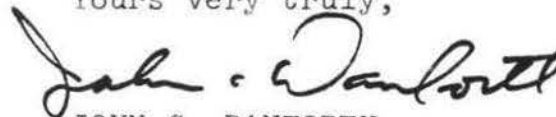
The fact that two voters, presumably voters in favor of moving the school house, promised to pay the expense of removal did not affect the legality of the action taken at the meeting. Similarly, we do not believe that the donation of money to the school district to defray the cost of submitting a proposal to incur bonded indebtedness to the voters of the district, even though made by a party interested in having an election held, would affect the legality of an election at which a bond issue was authorized. Elections should be so held as to afford a free and fair expression of the popular will and are not lightly set aside. Armantrout v. Bohon, 349 Mo. 667, 162 S.W.2d 867, 871 (1942). The donation of money to pay the cost of an election does not, in and of itself, prevent the free and fair expression of the people at the polls.

CONCLUSION

Therefore, it is the conclusion of this office that a six-director school district may accept money donated to the district by a dealer in bonds for the purpose of defraying the cost of an election on the question of whether the district should incur bonded debt.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, D. Brook Bartlett.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 35
4-29-58, Graham

Op. Letter No. 245
3-27-70, Millan

RECORDER OF DEEDS:
REAL ESTATE:

The term "any instrument conveying real property or any interest therein" as used in Senate Bill No. 22, 75th General

Assembly, refers to any instrument or document that passes from one party to another any legal or equitable interest in real property, whether such instrument or document be a Deed, Will or other instrument, and that such language is broad enough to cover those forms and orders of the Probate Court such as Orders of Distribution and Orders Approving Wills and Orders of the Circuit Court which do in fact convey or pass any interest in real estate.

OPINION NO. 226

July 1, 1970

Honorable David H. Jackson
Prosecuting Attorney
St. Clair County Courthouse
Osceola, Missouri 64776



Dear Mr. Jackson:

This is in response to your request for an opinion on the following question:

Section 17, Act 191, of the Seventy-fifth General Assembly refers to a "one dollar fee being charged by all recorders for the recording of any instrument conveying real property or any interest therein." To what does the term "any instrument conveying real property or any interest therein" refer?

You refer to Section 17 of Senate Bill No. 22 of the 75th General Assembly. The second paragraph of such section now appears as Section 59.319, V.A.M.S. Such section provides as follows:

"A user fee of one dollar shall be charged and collected by every recorder in this state, over and above any other fees required by law, as a condition precedent to the recording of any instrument conveying real property or any interest therein. The fee shall be forwarded monthly by each recorder of deeds to the state collector of revenue, and the fees so forwarded shall be deposited by the collector in the state treasury."

Honorable David H. Jackson

It would be an impossible task to list all instruments that could conceivably convey an interest in real property. Therefore, your question can only be answered in a general manner, with each case having to be decided upon its own facts in determining whether or not a particular instrument conveys an interest in real property.

In State v. Sutterfield, 176 S.W.2d 666,669 (St.L.Mo.App. 1944) the court stated:

"There is no magical meaning in the word 'conveyance'; it denotes an instrument which carries from one person to another an interest in land. If it does not do this it is not a conveyance."

The word "interest" as it refers to real estate is broader than the word "title", and literally includes every kind of claim to land which can form the basis of a property right. Ornatowski v. National Liberty Insurance Company of America, 290 Mich.241, 287 N.W.449,451. "Interest" as applied to property includes every quantity of ownership that a person may have from absolute ownership down to bare possession. Providence Washington Insurance Company v. Pass, 64 Georgia App.221, 12 S.E.2d 460,461. Again, as defined in Fletcher v. Winnfield, 160 La.261, 107 So.103, "interest" means a right in property, or some of the uses or benefits from which property is inseparable. While, of course, there are some claims against property that are not "interests in real property", the list of possible claims on real property that do constitute an "interest" in real property is almost endless.

The only way this definition can be narrowed is to determine whether or not a particular document, with a particular set of facts, conveys an "interest" in real property. Since those specific facts are not presented in this opinion, the question as to what particular documents represent a conveyance of an interest in real property cannot be decided here.

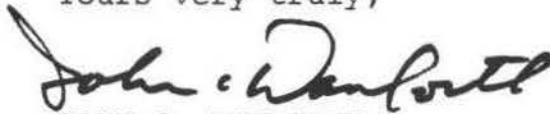
CONCLUSION

Therefore, it is the opinion of this office that the term "any instrument conveying real property or any interest therein" as used in Senate Bill No. 22, 75th General Assembly, refers to any instrument or document that passes from one party to another any legal or equitable interest in real property, whether such instrument or document be a Deed, Will or other instrument, and that such language is broad enough to cover those forms and orders of the Probate Court such as Orders of Distribution and Orders Approving Wills and Orders of the Circuit Court which do in fact convey or pass any interest in real estate.

Honorable David H. Jackson

The foregoing opinion, which I hereby approve, was prepared
by my assistant, Thomas L. Patten.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being more prominent.

JOHN C. DANFORTH
Attorney General

MOTOR VEHICLES:

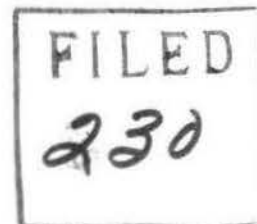
DRIVERS' LICENSES:

1. A person operating construction equipment (not a road machine or an implement of husbandry) on a public highway is required to have a license as an operator under Chapter 302, RSMo 1969, but is not required to have a chauffeur's license.
2. A person must be sixteen years of age before he can be licensed under Chapter 302 as an operator of such construction equipment on the public highways.

OPINION NO. 230

September 15, 1970

Honorable Alden S. Lance
Prosecuting Attorney
Andrew County Court House
415 West Main Street
Savannah, Missouri 64485



Dear Mr. Lance:

This is in response to your request for an opinion from this office as follows:

"The State Highway Department Weight Station located in Andrew County recently checked the operator of a self-propelled mobile crane being operated on pneumatic tires and which was solely designed for construction work and was therefore exempt from registration under the provisions of Section 301.133 RSMo. 1959, As Amended. The operator of this vehicle was an adult, male, over the age of 21 years, and he did not have in his possession or on his person, any sort of operator's or chauffeur's license to operate a motor vehicle upon the highways of the State of Missouri. A check of the records reveal that no active license was issued to him. The driver stated that he did not regularly operate this mobile crane and was only driving from job to job on an occasional basis.

"My question is would this individual be required under Missouri Law, to have either an

Honorable Alden S. Lance

Operator's or Chauffeur's License to legally operate this type of vehicle under the circumstances stated?

"If your answer to this question is no, then I want to know whether or not a person under the age of sixteen years to whom no license can be legally issued, or a person whose license is under revocation, would be able to legally operate such a vehicle upon the public highways of the State of Missouri?"

It is our understanding that this machine is not designed as such or used for road work but is designed to be used and is used for construction work generally.

You state the self-propelled motor crane being operated on the highway was solely designed for construction equipment and, therefore, exempt from registration under Section 301.133, RSMo. Such equipment is not designed for transportation of persons or property. You inquire whether a person operating such equipment on a public highway is required to have an operator's or chauffeur's license.

Section 301.133, RSMo to which you refer applies only to the registration of motor vehicles as such under Chapter 301, RSMo 1969, and exempts motor vehicles described therein from being registered as a motor vehicle. It has no application regarding the licensing of an operator or chauffeur of motor vehicles which is governed by Chapter 302, RSMo 1969.

Section 302.010, RSMo 1969, defines the words and phrases used in Chapter 302.

Section 302.010(1) provides:

"(1) 'Chauffeur', an operator who operates a motor vehicle in the transportation of persons or property, and who receives compensation for such services in wages, salary, commission or fare; or who as owner or employee operates a motor vehicle carrying passengers or property for hire; or who regularly operates a commercial motor vehicle of another person in the course of or as an incident to his employment, but whose principal

Honorable Alden S. Lance

occupation is not the operating of such motor vehicle; . . ."

It is our view that an operator of such a machine does not come within the terms of Section 302.010(1) which defines a "chauffeur" because it is not used for hauling persons or property and, therefore, such operator is not required to have a chauffeur's license.

Section 302.010(13) provides:

"(13) 'Operator', every person, other than a chauffeur, who is in actual physical control of a motor vehicle upon a highway; . . ."

Section 302.010(9) provides:

"(9) 'Motor vehicle', any self-propelled vehicle not operated exclusively upon tracks; . . ."

It is our view the machine you describe is a motor vehicle under Section 302.010(9), RSMo 1969 and an operator of such machine on a public highway is required to have a license as an operator under Chapter 302, RSMo unless otherwise exempt.

Section 302.020, RSMo 1969, provides:

"1. It shall be unlawful for any person, except those expressly exempted by section 302.080, to:

"(1) Operate, as a chauffeur, any vehicle upon any highway in this state unless he has a valid license as a chauffeur under the provisions of this chapter;

"(2) Operate, other than as a chauffeur, any motor vehicle, except farm tractor, upon any highway of this state unless he has a valid license as an operator under the provisions of this chapter. Any person holding a valid chauffeur's license shall not be required to procure an operator's license; . . ."

Section 302.080, RSMo 1969 exempts certain persons from the

Honorable Alden S. Lance

requirements of being licensed under Chapter 302, including:

"(1) Any person while driving or operating any road machine, farm tractor, or implement of husbandry temporarily operated or moved on a highway; . . ."

A farm tractor is defined in Section 302.010(6), RSMo as follows:

"(6) 'Farm tractor', every motor vehicle designed and used primarily as a farm implement for drawing plows, mowing machines and other implements of husbandry; . . ."

The term "road machine" is not defined by statute. We believe that such term clearly refers to machinery used in construction or repairing roads and highways.

The term "implement of husbandry" as used in Section 302.080, supra, is not defined by statute. In Nelson v. Fightmaster, 44 P. 213, 4 Okla. 38, the court held:

". . . implements of husbandry within the meaning of an exemption statute exempting all implements of husbandry used upon the homestead does not include a well drill and a derrick, which is used for hire and only occasionally on the farm."

The term only includes such implements as are required or used by the farmer in conducting his own farming operations.

It is our view that the motor vehicle in question is not a road machine, farm tractor or implement of husbandry and does not come within the exemption provisions of Section 302.080, supra, and the person operating such machine is not exempt from being licensed as an operator.

Under Section 302.060, RSMo 1969, a license shall not be issued to any person as an operator, who is under the age of sixteen.

CONCLUSION

It is the opinion of this office that:

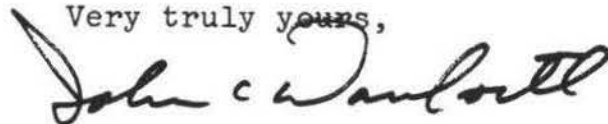
Honorable Alden S. Lance

1. A person operating construction equipment (not a road machine or an implement of husbandry) on a public highway is required to have a license as an operator under Chapter 302, RSMo 1969, but is not required to have a chauffeur's license.

2. A person must be sixteen years of age before he can be licensed under Chapter 302 as an operator of such construction equipment on the public highways.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

Very truly yours,

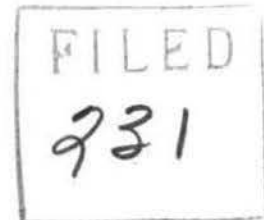
A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a stylized "D".

JOHN C. DANFORTH
Attorney General

March 17, 1970

OPINION LETTER NO. 231

Honorable William J. Esely
Prosecuting Attorney
P.O. Box 410
Bethany, Missouri 64424



Dear Mr. Esely:

This letter is in response to your opinion request concerning the following question:

"I have a question concerning the uniform allowance now provided for sheriffs and their deputies.

"Your office recently ruled that if the County Court allows this for one deputy or for the Sheriff, it cannot disallow it for other deputies.

"My question is, if the County Court is willing to allow only one monthly allowance and there is a sheriff and one deputy in the county, can the sheriff execute a written waiver of his allowance? Our sheriff is willing to buy his own uniforms and waive his allowance.

"Will you please advise whether this written waiver by the sheriff would be consistent with the law."

Section 57.295, V.A.M.S., which was contained in House Bill No. 264 of the 75th General Assembly provides:

"In each county of this state the sheriff and each full-time deputy sheriff shall receive twenty-five dollars per month, as a uniform allowance, to be paid to him monthly out of the county treasury at the discretion

Honorable William J. Esely

of the county court. This allowance shall apply only to sheriffs and deputy sheriffs who wear an official uniform in performance of their duty."

In our Opinion No. 432, dated October 10, 1969, to Holman, we held that this allowance was a reimbursement allowance. In Opinion No. 109, dated January 9, 1970, to Pruneau, we held that the county court has the discretion to determine whether or not such allowances shall be made, but does not have the authority to vary the amount of the monthly allowance from that fixed by the act or to provide the allowance for one such officer to the exclusion of the other such officers. We are enclosing copies of both opinions.

Under the circumstances that you present, we see no problem in the sheriff waiving such a reimbursement allowance; and in our view, his written waiver would not be inconsistent with the provisions of the law or the legislative intent.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Encs: Opinion No. 432, Holman, 10/10/69
Opinion No. 109, Pruneau, 1/9/70

COUNTIES:
COUNTY COURTS:
NEWSPAPERS:

A county of the third class in which there is more than one qualified newspaper is not required to award the printing of the county financial statement on competitive bids.

April 21, 1970

OPINION NO. 232

Honorable Lowell McCuskey
Prosecuting Attorney
Osage County Courthouse
Linn, Missouri 65051



Dear Mr. McCuskey:

This is to acknowledge receipt of your request for a formal opinion from this office which reads as follows:

"Is a county of the third class in which there is more than one qualified newspaper required to award the printing of the county financial statement on competitive bids?"

In regard to your request, Section 50.800, RSMo 1959 as amended by Laws of 1969, reads in part as follows:

"1. On or before the first Monday in March of each year, the county court of each county shall prepare and publish in some newspaper of general circulation published in the county, if there is one, and if not by notices posted in at least ten places in the county, a detailed financial statement of the county for the year ending December thirty-first, preceding."

In Op. Atty. Gen. No. 71, Pinnell, 2-7-55, this office has previously advised that the county court is authorized under Section 50.800, RSMo 1959 as amended by Laws of 1969, to publish the county financial statement at the county's expense in only one newspaper of general circulation published in the county. (Copy attached).

Although there is no provision in Section 50.800, RSMo 1959 as amended by Laws of 1969, in regard to selection of a newspaper for such publication, Section 493.030, RSMo 1959 as amended by Laws of 1969, provides in part that "When any . . . notice shall be published in any newspaper . . . for any county or for any public officer on account of, or in the name of any county . . ."

there shall not be charged or allowed a higher rate than therein specified. In addition, Section 493.040, RSMo 1959, reads as follows:

"In procuring the publication of any law, proclamation, advertisement, order or notice, as in section 493.030 mentioned, the public officers shall accept of the most advantageous terms that can be obtained, not exceeding the rates limited in said section."

It was held in Op. Atty. Gen. No. 71, Holman, 7-12-56, that the publication of the financial statement required by Section 50.800 is included within the meaning of Section 493.030, RSMo 1959 as amended by Laws of 1969, (copy attached). It is submitted therefore that the question arises as to whether public officers in procuring publication under Section 493.030, at the most advantageous terms that can be obtained, not exceeding the rates limited in said section, requires that competitive bids be taken.

In the case of State ex rel. Shartel v. Westhues, 9 S.W.2d 612, the contention was made that the Secretary of State should be enjoined and restrained from arbitrarily awarding a contract to a newspaper for the publication of a proposed constitutional amendment at the maximum rate specified in Section 10402, R.S. 1919, the predecessor to Section 493.030, RSMo 1959 as amended by Laws of 1969. One of the arguments made was that the language of Section 10402, R.S. 1919, "that the officer shall accept the most advantageous terms that can be obtained", required that the printing be awarded to the lowest and best bidder. In rejecting this argument, the court said at page 619:

"The legislative department has intrusted to an administrative officer the right and duty to exercise his discretion in determining what terms are 'most advantageous,' and up to this time the General Assembly has seen fit neither to define what it means by the words 'Most advantageous terms' nor to rebuke any secretary of state for the manner in which he has exercised such discretion in the past."

The court further held that the acts of the secretary of state in proposing to designate a newspaper in each county of the state and in the city of St. Louis for publication of the constitutional amendments without taking or receiving competitive bids for such publications did not amount to fraudulent conduct or an abuse of official discretion as to give to the courts the right to control the discretion of the secretary of state.

Honorable Lowell McCuskey -

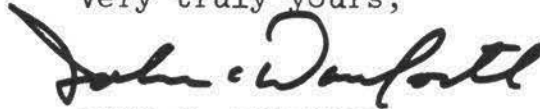
In view of the above, it is our belief that the county court in procuring publication of the county financial statement under Section 493.030, RSMo 1959 as amended by Laws of 1969, at the most advantageous terms that can be obtained, not exceeding the rates limited in said section, is not required to take competitive bids.

CONCLUSION

A county of the third class in which there is more than one qualified newspaper is not required to award the printing of the county financial statement on competitive bids.

The foregoing opinion, which I hereby approve, was prepared by my assistant, B. J. Jones.

Very truly yours,



JOHN C. DANFORTH
Attorney General

enclosures:

Op. No. 71, Pinnell, 2-7-55
Op. No. 71, Holman, 7-12-56

PUBLIC FUNDS: A deputy magistrate clerk of a third
MAGISTRATE CLERK: class county who loses public funds
DEPUTY MAGISTRATE CLERK: in his possession is primarily liable
for the loss. In the event of his
default in payment his surety is liable for said loss. Liability
for the loss of the public funds also lies with the magistrate clerk
and his surety.

OPINION NO. 233

July 1, 1970

Honorable James N. Foley
Prosecuting Attorney
Macon County Court House
Macon, Missouri 63552



Dear Mr. Foley:

This is in reply to your request for an official opinion from
this office in answer to the following questions:

1. Of the following persons who is to
bear the loss of the \$3,493.00 allegedly
stolen from the possession of the deputy
magistrate clerk of Macon County?

- a. The Probate-Magistrate Judge?
- b. The Probate-Magistrate Clerk?
- c. The Deputy Magistrate Clerk?
- d. The County of Macon?
- e. The securities on the bond for
the above mentioned persons?

You state that the Magistrate Clerk has given a bond provided
for in Section 483.025, RSMo 1959.

Under Chapter 483, RSMo 1959, dealing with Clerks of Courts of
Record and Court Records, Section 483.025, RSMo 1959, provides as
follows:

"Every clerk, before he enters on the
duties of his office, shall enter into
bond, payable to the state of Missouri,
with good and sufficient securities, who

Honorable James N. Foley

shall be residents of the county for which the clerk is appointed or elected, in any sum not less than five thousand dollars, except as otherwise provided by law, the amount to be fixed and the bond to be approved by the court of which he is clerk, or by a majority of the judges of such court, in vacation.

"2. The bond shall be conditioned that he will faithfully perform the duties of his office, and pay over all the moneys which may come to his hands by virtue of his office, and that he, his executors or administrators, will deliver to his successor, safe and undefaced, all books, records, papers, seals, apparatus and furniture belonging to his office."

Section 476.010, RSMo 1959, provides that magistrate courts are "Courts of Record."

Furthermore, Section 483.485, Mo. 1967 Supp., dealing with magistrate courts states in part as follows:

". . . Before entering upon the duties of his office, the clerk and deputy clerk shall enter into a bond to the state of Missouri, with good and sufficient sureties, to be approved by the magistrate, in the sum of one thousand dollars, conditioned that he will faithfully discharge all of the duties of his office; which bond shall be filed and recorded in the office of the county clerk of the county. In the event a surety bond is given by a surety company authorized to do business in this state, the cost thereof shall be paid by the state from the magistrate fund upon the requisition of the magistrate. For breach of any of the conditions of such bond suit may be brought as upon other penal bonds. Any magistrate or clerk of the magistrate court failing or refusing in his receipts for fees to give an itemized account of such charge, with date, shall upon conviction be deemed guilty of a misdemeanor. In

Honorable James N. Foley

all counties where magistrates organize into a court with divisions there shall be but one clerk of the magistrate court who may act as clerk for one of the magistrates. There shall not be more than one deputy clerk for each magistrate and all deputies shall be under the direction of the clerk but shall be appointed by the court."

Each of these bonds is conditioned among other things on the faithful discharge of all the duties of the bonded official.

Section 483.075(1), RSMo 1959, sets out the duties of clerks of courts of record. It provides in part:

"1. Every clerk shall record the judgments, rules, orders and other proceedings of the court, and make a complete alphabetical index thereto; issue and attest all process when required by law and affix the seal of his office thereto, or if none be provided, then his private seal; keep a perfect account of all moneys coming into his hands on account of costs or otherwise, and punctually pay over the same."

Section 438.080, RSMo 1959, provides:

"Every clerk may appoint one or more deputies, to be approved by the judge or judges, or a majority of them in vacation, or by the court, who shall be at least seventeen years of age and have all other qualifications of their principals and take the like oath, and may in the name of their principals perform the duties of clerk; but all clerks and their sureties shall be responsible for the conduct of their deputies."

In the case of State of Missouri, to the use of the City of St. Louis v. Thornton, 8 Mo.App. 27 (1897), the plaintiff sued defendant and the sureties on his official bond for defendant's failure to pay over all the fees for which he was responsible. The court held that where the statute makes it the duty of the clerk to pay over to the county treasurer all public funds in his possession, his failure to do so is a breach of his bond for the faithful discharge of his

Honorable James N. Foley

duties, and the sureties on his bond are concluded by the order of the court.

Opinion No. 49, issued by the Attorney General on January 20, 1951, and enclosed herewith, holds that a custodian of public funds is liable as an insurer for any loss thereof. Furthermore, in that opinion it was held that "if for any reason he [officer in question] should default, the sureties on his bond could be held liable to make good the loss."

In the case of State ex rel. Courtney v. Callaway, 237 S.W. 173, 208 Mo.App. 447 (K.C. Ct.Apps. 1922), the court held that where funds come into the hands of the clerk in his official capacity, "he may be held liable as an insurer of the funds." Furthermore, where the funds were received and held by the clerk as part of his official duties, the bond is valid.

Therefore, the Deputy Clerk is primarily liable as custodian of the funds in question. In the event the Deputy Clerk defaults in payment, his sureties are liable. Furthermore, since the Probate-Magistrate Clerk appointed the Deputy Magistrate Clerk, the Probate-Magistrate Clerk along with his surety is ultimately liable for the conduct of his deputy. In view of the fact that the bonds of the deputy magistrate clerk and magistrate clerk are at least \$6,000.00 (\$1,000.00 minimum for the deputy clerk under Section 483.485 and \$5,000.00 minimum for the magistrate clerk under Section 483.025), an amount greatly in excess of the alleged shortage, we believe it unnecessary to determine whether the magistrate judge could be held liable for such loss.

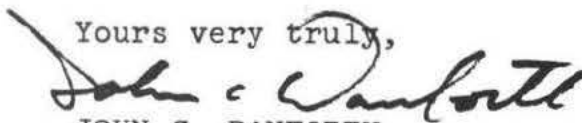
CONCLUSION

It is the opinion of this office that when cash from fines and costs in magistrate county were allegedly stolen from the desk of the deputy magistrate clerk:

1. The Deputy Magistrate Clerk is primarily liable for the loss of such public funds. In the event of his default in payment, his surety is liable for loss in the amount of the bond extended by such deputy clerk.
2. The magistrate clerk is also liable for such loss of public funds. In the event of default in payment by such clerk, his surety is also liable for such loss in the amount of the bond executed by the magistrate clerk.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Harvey M. Tettlebaum

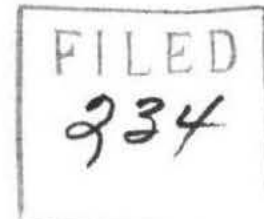
Yours very truly,


JOHN C. DANFORTH
Attorney General

Answer by letter-Ashby

March 23, 1970

OPINION LETTER NO. 234



Honorable Charles S. Broomfield
State Representative, District 87
4801 North Lister
Kansas City, Missouri 64119

Dear Representative Broomfield:

This letter is written to answer your inquiry whether there is a conflict between Section 71.150 and Section 89.080, V.A.M.S. and the above statutes' application regarding the Board of Adjustment under your ordinance.

Section 71.150 of the Revised Statutes of Missouri, 1959, reads, in pertinent parts, as follows:

"Property qualifications for officers prohibited.--No property qualification shall be required of any person to render him eligible to any office in any city or incorporated town."

Section 89.080, RSMo 1959, reads as follows:

"Such local legislative body shall provide for the appointment of a board of adjustment, and in the regulations and restrictions adopted pursuant to the authority of sections 89.010 to 89.140 may provide that the said board of adjustment may determine and vary their application in harmony with their general purpose and intent and in accordance with general or specific rules therein contained. The board of adjustment shall consist of five members, who shall be freeholders. The membership of the first board appointed shall

Honorable Charles S. Broomfield

serve respectively, one for one year, one for two years, one for three years, one for four years, and one for five years. Thereafter members shall be appointed for terms of five years each. All members shall be removable for cause by the appointing authority upon written charges and after public hearings. Vacancies shall be filled for the unexpired term of any member whose term becomes vacant. The board shall elect its own chairman who shall serve for one year. The board shall adopt rules in accordance with the provisions of any ordinance adopted pursuant to sections 89.010 to 89.140. Meetings of the board shall be held at the call of the chairman and at such other times as the board may determine. Such chairman, or in his absence the acting chairman, may administer oaths and compel the attendance of witnesses. All meetings of the board shall be open to the public. The board shall keep minutes of its proceedings, showing the vote of each member upon question, or, if absent or failing to vote, indicating such fact, and shall keep records of its examinations and other official actions, all of which shall be immediately filed in the office of the board and shall be a public record. All testimony, objections thereto and rulings thereon, shall be taken down by a reporter employed by the board for that purpose."

It is a recognized rule of statutory construction that statutes relating to the same subject matter must be considered together even though the statutes may be found in different chapters and were enacted at different times. (State ex rel. Schwab v. Riley, (Mo.) 417 S.W.2d 1). Section 71.150, supra, is a general statute and Section 89.080, supra, is a special statute. See Waterman v. Chicago Bridge and Iron Works, (Mo.) 41 S.W.2d 575, 577. A special statute takes precedence over a general statute. Gross v. Merchants Produce Bank, (Mo.) 390 S.W.2d 591. There is a conflict between Sections 71.150 and Section 89.080, supra. Section 89.080 would govern in those special cases where it is applicable as here under the facts.

However, for your information, the planning and zoning commission authorized by your ordinance under Section 2-51 is appointed under the authority of Section 89.070, RSMo 1959. We have ruled on the validity of this board in our Opinion No. 21 dated January 12, 1970, issued at your request.

Honorable Charles S. Broomfield

The Board of Zoning Adjustment appointed under Section 2-56 of your ordinance is appointed under authority of Section 89.080. The requirements that the members be freeholders is perfectly valid because Section 89.080, supra (as a special statute), states the Board of Adjustment "shall consist of five members, who shall be freeholders."

We conclude that Section 2-56 of the ordinance requiring members of the Board of Adjustment to be freeholders is valid.

Yours very truly,

JOHN C. DANFORTH
Attorney General

PUBLIC WATER SUPPLY DISTRICTS:
TAXATION (EXEMPTIONS):

Public water supply districts formed under the provisions of Section 247.010 to 247.220, RSMo, are not subject to the payment of property taxes.

OPINION NO. 236

May 1, 1970

Honorable Lowell McCuskey
Prosecuting Attorney
Osage County Court House
Linn, Missouri 65051



Dear Mr. McCuskey:

This is in response to your request for an official opinion on the question whether Public Water Supply Districts formed under the provisions of Section 247.010 to 247.220, RSMo 1959, are subject to payment of property taxes.

Section 247.010 expresses the intention of the legislature to make available conveniences in the use of water to the many inhabitants of the state now denied such conveniences and thereby promote health, sanitation and the public welfare.

Section 247.020, RSMo, states that such districts shall be public corporations. Under Section 247.050, RSMo, these public corporations are empowered through the county court to tax all taxable property within the district. Section 247.120, RSMo, sets forth the manner in which such taxes shall be levied and collected.

Article X, Section 6 of the Constitution of Missouri provides in part:

"All property, real and personal, of the state, counties and other political subdivisions, . . . shall be exempt from taxation; . . ."

Article X, Section 15 of the Constitution sets forth the definition of the term "other political subdivision" as follows:

"The term 'other political subdivision,' as used in this article, shall be construed to include townships, cities, towns, villages, school, road, drainage, sewer and levee districts and any other public subdivision, public corporation or public quasi-corporation having the power to tax."

Honorable Lowell McCuskey

Inasmuch as public water supply districts are public corporations having the power to tax, they are political subdivisions as defined in the Constitution.

Section 137.100, RSMo, provides that land and other property belonging to any city, county, or other political subdivision in this state "shall be exempt from taxation for state, county or local purposes."

These constitutional and statutory provisions are in accord with the general rule that public property and the various instrumentalities of government are not subject to taxation. They are also in accord with the principal stated by the court in Normandy Consol. School Dist. of St. Louis v. Wellston Sewer Dist. of St. Louis County, 77 S.W.2d 477, l.c. 478 (St.L.Ct.App. 1934) that ". . . to require public funds to be paid out for taxes would necessarily divert such funds from the true public use which they are otherwise designed to serve. . . ."

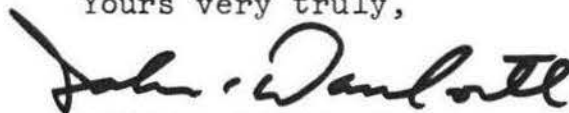
It appears therefore that the exemption from taxation accorded to cities and counties by Section 137.100 applies in the same manner and to the same degree to other political subdivisions such as public water supply districts.

CONCLUSION

It is the opinion of this office that public water supply districts formed under the provisions of Section 247.010 to 247.220, RSMo, are not subject to the payment of property taxes.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, L. J. Gardner.

Yours very truly,



JOHN C. DANFORTH
Attorney General

ELECTION:
ELECTION JUDGES:

Committeemen and committeewomen of both political parties are not qualified to serve as election judges and clerks under the terms of Section 111.171, V.A.M.S., 1969-70 Cum. Supp.

OPINION NO. 237

April 3, 1970

Honorable Ted Salveter
State Representative
District 142
1005 Woodruff Building
Springfield, Missouri 65806



Dear Representative Salveter:

This letter is in response to your request for an official opinion of this office on the following question:

"In the next few weeks there will be several city, county, state and other elections, particularly the one on April 7, 1970. A question has arisen whether Committeemen and Committeewomen of both political parties are now forbidden to work as judges and clerks under Section 111.170, RSMo, 1969, Sub-Section 1."

Subsection 1 of Section 111.171, V.A.M.S. 1969-70 Cum Supp. states as follows:

"1. No person shall be qualified to act as judge or clerk of any registration or election in this state unless he is legally entitled to vote at the next election following his appointment. He must be a person of good repute and character who can speak, read and write the English language. He must reside in the precinct, ward, township or election district for which he is selected to act. He must not hold any office or employment under the United States, the state of Missouri, or under the county, city, or other political subdivision involved in the election to be held at the time of his appointment. He must not be a candidate for any office at the next ensuing election but a notary public shall not be disqualified from acting as a judge or clerk."

Honorable Ted Salveter

Do party committeemen ". . . hold any office . . . under . . . the state of Missouri, or under the county, city, or other political subdivision involved in the election to be held at the time of his appointment. . . ."?

In State ex rel. Ponath v. Hamilton, 240 S.W. 445 (Mo. en banc 1922) the Court concluded that an election for party committeemen involved an election for a county office so as to permit an election contest under Section 4896, RSMo 1919, now Section 124.250, RSMo 1959:

"We conclude, therefore, not from inference or implication, but from an interpretation based upon the nature and purpose of the statute creating party committeemen and the uniform character of the duties devolving on them as such, regardless of whether they are elected in the city of St. Louis by wards or in a county be townships, that they are, so far as affects their official tenure and the right to maintain and establish same, county officers; and hence within the purview of the section (4896, R. S. 1919) regulating contested elections." Id. at 448

Before reaching this conclusion, the Court had pointed out that "The law specifies the terms and prescribes the powers of the committeemen. This exercise of power characterizes all statutes defining public officers. . . ." Id. at 447. After listing the statutorily imposed duties, the Court stated as follows:

". . . It is therefore from the nature of the duties the law imposes on him that the character of his position is to be determined. We have shown that the law defines the duties and that their performance involves the discharge of certain functions of government. This, without more, is sufficient to authorize the classification of such a committeeman, if not as a public officer in the full sense of the term, as holding a position analogous thereto." Id. at 447

In State ex rel. Dawson v. Falkenhainer, 15 S.W.2d 342 (Mo. en banc 1929) relator argued that a party committeeman elected at a primary election is not an officer so that the statutes applying to election contests for officers do not apply. The Court held that the election of a ward committeemen in the City of St. Louis was an election of a public officer:

Honorable Ted Salveter

"Notwithstanding authorities to the contrary, this court has held in *State ex rel. Ponath v. Hamilton* (Mo. Sup.) 240 S.W. 445, and supported the holding by authorities from other states, that a political committeeman is a public officer within the purview of section 4896, R. S. 1919, which provides for election contests. In that case this court carefully analyzed out statutes, and pointed out the particular provisions which place certain duties and obligations upon the political committeeman, such as to constitute him a public officer, holding that his powers are a matter of public concern. While his official duties pertain only to the management of the affairs of his party, still they affect the welfare of the entire community and exercise some of the functions of government. It is just as important that he should be honestly elected as any official, the exercise of whose powers and authority affects the welfare of the community. Our statute, in creating the office of political committeeman, provided for it most responsible functions, whose discharge affects the general welfare." *Id.* at 343

See, also, *Noonan v. Walsh*, 364 Mo. 1169, 273 S.W.2d 195 (Div. 2, 1954) in which the Court stated as follows:

"A committeewoman is elected under the statutes enacted by the General Assembly and is charged with the duty of performing certain functions of government, *State ex rel. Ponath v. Hamilton*, Mo., 240 S.W. 445, and is, therefore, a 'public officer.' *State ex rel. Kaysing v. Ryan*, 334 Mo. 743, 67 S.W.2d 983; *State ex rel. Dawson v. Falkenhanier*, 321 Mo. 1042, 15 S.W.2d 342. And, since an election contest involves 'the title to any office under this state'. V.A.M.S.Const. Mo. art. 5, § 3, appellate jurisdiction of the appeal is appropriately in this court. *State ex inf. Barrett ex rel. McCann v. Parrish*, 307 Mo. 455, 270 S.W. 688; *State ex rel. Davidson v. Caldwell*, 310 Mo. 397, 276 S.W. 631; *Armantrout v. Bohon*, Mo.App., 157 S.W.2d 530." *Id.* at 196

Based on the *Ponath*, *Falkenhanier* and *Noonan* cases it may be concluded that for the purposes of an election contest a political committeeman holds a public office under the state, or, more specifically, is a county officer. As was pointed out in the *Falkenhainer*

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case, the purpose behind the election contest statute is to provide for the honest election of officials whose powers and authority affect the welfare of the community.

However, in the case of State ex rel. Wright v. Carter, 319 S.W.2d 596 (Mo. en banc 1958), the Court refused to find that party committeemen were candidates for a "county office" for the purposes of the Corrupt Practices Act. The Court distinguished the Ponath case on the ground that the Corrupt Practices Act was penal in nature and therefore must be given no broader application than is warranted by its plain and unambiguous terms. Furthermore, there were "incongruities" in the wording of the statutory sections which were "persuasive" that the legislature did not intend them to apply to committeemen. Id. at 599.

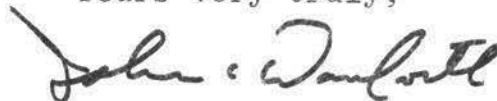
We find no incongruities in the wording of Section 111.171 which are persuasive in that the legislature did not intend Section 111.171 to apply to committeemen. On the contrary, we believe that if party committeemen are "public officers" or "county officers" for one part of the election process, i.e., challenges to their election, they also hold a county office for the purposes of another part of the election process, i.e., qualification to be a judge or clerk. Therefore, we conclude that party committeemen are disqualified under Section 111.171 from serving as election judges and clerks.

CONCLUSION

It is the opinion of this office that committeemen and committeewomen of both political parties are not qualified to serve as election judges and clerks under the terms of Section 111.171, V.A.M.S., 1969-70 Cum. Supp.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, D. Brook Bartlett.

Yours very truly,



JOHN C. DANFORTH
Attorney General

CONSTITUTIONAL LAW:
ZONING:
SCENIC RIVERS:

1. It is within the police power for the state to enact zoning laws restricting the use of property when reasonably necessary for the promotion of public health, safety, morals and general welfare.

2. That if such law is necessary for the promotion of the public health, safety, morals and general welfare, it does not constitute the taking of private property without due process of law in violation of Article 1, Sections 10, 26, 27 and 28 of the Constitution. 3. Whether the proposed act creating the Missouri Scenic Rivers System is reasonable and necessary for the promotion of the public health, safety, morals and general welfare depends upon the facts and evidence -- which will have to be determined by a court.

OPINION NO. 238

April 7, 1970

Honorable Ted Salveter
State Representative
142nd District
1005 Woodruff Building
Springfield, Missouri 65806



Dear Representative Salveter:

This is in response to your request for an opinion from this office as follows:

"Attached to this letter is a copy of the proposed 'Missouri Scenic Rivers Act'. I am sure that you are familiar with this movement and with some of the controversy surrounding it. I am not concerned with the wisdom, philosophy or logic of this proposed law, but I am concerned with the Constitutionality of portions of it.

"Section 3. proposes restrictions upon the use of land bordering certain rivers in the nature of Zoning regulations. Its basic purpose is to forbid the building

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of any new structures upon this land, to preserve its natural beauty. Most of the land involved is probably farm land and will not be affected by this. However, some of the land has been purchased at a high cost for the express purpose of building and developing. If this were not allowed, it would involve a considerable economic loss to the landowner. There seems to be no specific section allowing for compensation to the landowner in such a situation.

"I would appreciate it if you would give me an opinion concerning whether the proposed law would violate Sections 10, 26, 27 and 28 of the Constitution of the State of Missouri or any other Constitutional provision or law."

Sections 10, 26, 27 and 28 of the Constitution to which you refer are found in Article 1 of the Constitution of Missouri, 1945. They relate to due process of law and acquiring property by eminent domain.

You enclose a copy of an Initiative Petition which you state is now being circulated for the purpose of obtaining signatures to be submitted to the vote of the people for establishment of a Missouri Scenic Rivers System.

Section 1 states that this act may be cited as the "Missouri Scenic Rivers Act".

Section 2 states its purpose as:

"The system, as defined in Section 4 of this act, shall be administered for the purpose of preserving certain scenic rivers or segments thereof in a free-flowing and unpolluted state, with their adjoining natural shore environment, for the permanent enjoyment of primitive type outdoor recreation, as distinguished from mass recreational development; and for the purpose of preserving the wildlife, outstanding scenic, recreational, ecological, geological and other natural features along these Ozark rivers or segments thereof, all for the health, morals, education, and general welfare

of this generation and all succeeding generations; however, it is not the intent of this act to require the acquisition of lands within the boundaries of the system."

Section 4 of the act describes the area that is to be within the Missouri Scenic River System, designates the rivers or segments of the rivers included in the system and which includes 300 horizontal feet of the bank on each side of each river with access points which the administrator may acquire.

Section 3 (2) provides:

"'Zoned for scenic preservation': zoned as follows: (a) no new structure, sign, billboard, or trailer may hereafter be built or placed there, but normal repair or maintenance of existing structures is permissible; (b) except as explicitly authorized herein, no use may be made of any such lands other than cropping or pasturing of existing open lands, using recognized and generally accepted good agricultural practices, or management of timber stands, including timber harvest, through application of good forest management practices, in accordance with sections 254.010 to 254.300, R.S. Mo., and regulations thereunder; (c) specifically, there shall be no dumping, littering, or excavation, and no clear-cutting of timber; (d) overhead utility lines or other public uses may be introduced only when specifically approved in writing by the administrator; (e) an existing non-conforming use may be continued, subject to the following limitations:

- (1) It may not be enlarged or expanded in any way;
- (11) No dumping, littering, refuse burning, salvage or disposal operation may continue. Any unsightly remains of any such use shall be removed as soon as practicable by or under the direction of the administrator, who shall have the right to enter or cross any lands or waters for such

purpose at any reasonable time.

(f) In any area owned by the State Park Board and operated as a State park of the effective date of this act, the State Park Board may continue to exercise such powers as it has on that date. Any component of the system which shall become a part of any state park, wildlife refuge, or similar area shall be subject to the provisions of this act and the laws under which the other areas may be administered and in the case of conflict between the provisions of these laws the more restrictive provisions shall apply.

(3) 'Scenic easement': a voluntary agreement between the administrator and the owner or occupant, concerning the use of the land, the purpose being to maintain and enhance the natural beauty and appearance of the landscape. A scenic easement may not permit any use prohibited by this act. A scenic easement shall not create any right of public access or use without the express consent of the parties. A scenic easement may exceed the boundaries of the system."

Section 8(1) provides in part that "no landowner shall be forced to give up title to landholdings or easement interest by reason of this act."

The first question to be considered is the effect of Article 1, Sections 10, 26, 27 and 28 of the Constitution of Missouri, 1945. These sections deal with the due process of law and the taking of private property by eminent domain without compensation.

The principles of law that apply to the law of Zoning and Planning must be applied to the proposed act, since it involves the authority of the state to enact zoning laws.

Zoning laws and regulations must satisfy the due process requirements of the Constitution. In 101 C.J.S. §27, Zoning it is stated:

"Zoning laws and regulations, in order to be valid, must meet the constitutional demands of due process. Generally speaking, these demands are met if such laws or regulations bear a substantial relation to public health, safety, morals, or

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general welfare, and are not arbitrary or unreasonable. Conversely, laws or regulations of this nature are unconstitutional, either generally or as applied to particular property, if they bear no substantial relation to public health, safety, morals, or general welfare, or are arbitrary and unreasonable."

Zoning laws and regulations must also comply with the constitutional provision regarding the taking of private property without compensation. The rule is stated in 101 C.J.S. §29, Zoning as follows:

"Building or zoning laws and regulations must meet the demands of the constitutional prohibition against the taking of private property for public use without just compensation, and restrictions which are arbitrary or unreasonable or lacking in any substantial relation to the public health, safety, morals, or general welfare come within the constitutional inhibition, as where a regulation permanently so restricts the use of property that it cannot be used for any reasonable purpose.

"The protection accorded by this constitutional prohibition is, however, qualified by the police power, and reasonable restrictions, bearing a substantial relation to the public health, safety, morals, or general welfare, imposed in the exercise of the police power, do not fall within the constitutional ban. Where premises located in a certain zone can be used for a certain purpose if permission is obtained therefor, the validity of the regulation may not be challenged on the theory that there is a prohibition against using the property for that purpose, thus constituting a taking of property without compensation." (Emphasis supplied)

It is seen from these constitutional provisions that if the zoning law is reasonable and comes within the police power of the state, it does not violate the constitutional provisions providing

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the taking of property without just compensation or due process of law.

The distinction between eminent domain and the police power of the state is stated in 29 C.J.S. §6 as follows:

"It has been said to be difficult to distinguish consistently between the right of eminent domain and the police power, so that they have sometimes been confused; however, they are quite distinct, although analogous. Briefly, eminent domain takes property because it is useful to the public, while the police power regulates the use of property or impairs rights in property because the free exercise of these rights is detrimental to public interest; and the police power, although it may take property does not, as a general rule, appropriate it to another use, but destroys the property, while by eminent domain property is taken from the owner and transferred to a public agency to be enjoyed by the latter as its own. More fully, many statements of the distinction agree to the effect that in the exercise of eminent domain private property is taken for public use and the owner is invariably entitled to compensation, while the police power is usually exerted merely to regulate the use and enjoyment of property by the owner, or, if he is deprived of his property outright, it is not taken for public use, but rather destroyed in order to promote the general welfare, and in neither case is the owner entitled to any compensation for any injury which he may sustain, for the law considers that either the injury is *damnum absque injuria* or the owner is sufficiently compensated by sharing in the general benefits resulting from the exercise of the police power.

"Regulations enacted under the inherent power of the state to protect the lives and secure the safety, peace, and welfare of the people are enacted under the police power and do not constitute a taking under the power of eminent do-

main, although they may interfere with private rights without providing for compensation. Constitutional provisions against the taking of private property for public use without just compensation impose no barrier to the proper exercise of the police power; uncompensated obedience to a regulation enacted in the exercise of police powers for purposes of public safety or welfare does not constitute taking or damaging property without just compensation, and damage, loss, or injury from a valid exercise of the police power gives rise to no right to recover compensation.

"There is no set formula to determine where regulation ends and taking begins; so, the question depends on the particular facts and the necessities of each case, and the court must consider the extent of the public interest to be protected and the extent of regulation essential to protect that interest. Thus, police regulations must be reasonable, and the legislature cannot, under the guise of the police power, impose unreasonable or arbitrary regulations which go beyond that power, and in effect deprive a person of his property within the purview of the law of eminent domain, as by depriving the owner of all profitable use of the property not per se injurious or pernicious, restricting the lawful uses to which the property can be put and destroying its value, permanently so restricting the use of the property that it cannot be used for any reasonable purpose, or completely destroying the beneficial interest of the owner.

"The legislature may, under the police power, within the limitations stated, and without infringing constitutional inhibitions against the taking of property without compensation, authorize the abatement of a nuisance or the destruction of property constituting it, or both, the seizure or destruction of property having an unlawful existence,

or the condemnation or forfeiture of property used in the violation of law, and make other reasonable regulations to promote the public health and the general welfare of the community. So, it has been held to be an exercise of the police power, rather than of the right of eminent domain, to forbid the use of property in a manner hurtful to the health and comfort of the community."

The general rule is that reasonable zoning especially where it is comprehensive is constitutional and valid as a public police power of the state. *Taylor v. Schlemmer*, 353 Mo. 687, 183 S.W.2d 913. *State v. Loesch*, 169 S.W.2d 675. We find these principles of law are to be applied to zoning laws and regulations and that if it is a proper zoning law it does not violate the provisions of Article 1, Sections 10, 26, 27 and 28 of the Constitution, if it is found that such laws are necessary for the promotion of public health, safety, morals or general welfare of the people.

In *Deimeke v. State Highway Commission*, 444 S.W.2d 480, the Supreme Court considered the constitutionality of a statute enacted by the legislature providing for the licensing and operation of junk yards within 1000 feet of certain state highways. In discussing the question of the authority to enact zoning laws under the police power the court states l.c. 482:

"[3] It now is well established that the state, in the exercise of its police power, may restrict the use of property when reasonably necessary for the promotion of the public health, safety, morals or welfare, 'the reason and basis underlying such decisions being that the personal and property rights of the individual are subservient and subordinate to the general welfare of society, and of the community at large, and that a statute or ordinance which is fairly referable to the police power has for its object the "greatest good of the greatest number."' *Bellerive Inv. Co. v. Kansas City*, 321 Mo. 969, 13 S.W.2d 628, 634. This is the basis upon which zoning laws are upheld. *State ex rel. Oliver Cadillac Co. v. Christopher*, 317 Mo. 1179, 298 S.W. 720. Missouri also has upheld billboard regulations on this ground. *St. Louis Gunning Advertising Co. v. City of St.*

Honorable Ted Salveter

Louis, 235 Mo. 99, 137 S.W. 929; University City v. Diveley Auto Body Co., Mo., 417 S.W.2d 107. The same is true with respect to action by the City of St. Louis in zoning against establishment of a junkyard. City of St. Louis v. Friedman, 358 Mo. 681, 216 S.W.2d 475. However, the courts have protected existing nonconforming uses where they did not constitute a nuisance. Hoffman v. Kinealy, Mo., 389 S.W.2d 745."

The court in this case held that it is within the police power of the state to license and regulate junk yards under the general welfare of the state.

Whether a zoning law is reasonable and constitutional or arbitrary and unreasonable depends on careful examination of the evidence and the circumstances in each case. City of Richmond Heights v. Richmond Hts. M. P. B. Ass'n 213 S.W.2d 47, 358 Mo. 70. Women's Christian Ass'n of Kansas City v. Brown, 190 S.W.2d 900.

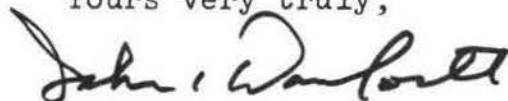
CONCLUSION

It is the opinion of this office that:

1. It is within the police power for the state to enact zoning laws restricting the use of property when reasonably necessary for the promotion of public health, safety, morals and general welfare.
2. That if such law is necessary for the promotion of the public health, safety, morals and general welfare, it does not constitute the taking of private property without due process of law in violation of Article 1, Sections 10, 26, 27 and 28 of the Constitution.
3. Whether the proposed act creating the Missouri Scenic Rivers System is reasonable and necessary for the promotion of the public health, safety, morals and general welfare depends upon the facts and evidence -- which will have to be determined by a court.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,

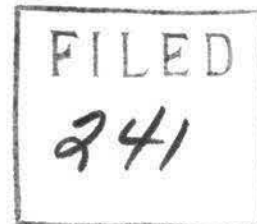


JOHN C. DANFORTH
Attorney General

April 3, 1970

OPINION LETTER NO. 241

Honorable Omer H. Avery
State Senator, 21st District
102 Troy Building
Troy, Missouri 63379



Dear Senator Avery:

This letter is in response to your opinion request concerning Ordinance No. 525 of the City of Fulton, approved March 5, 1970, and dealing with the parks and recreation.

It is our understanding that your question is directed to the validity of the ordinance and, in particular, as to whether the ordinance is invalid for the reason that four members of the City Council are constituted voting members of the Commission on Parks and Recreation in addition to nine "citizen" members.

We will address ourselves to that particular question and not attempt to pass upon the entire ordinance in view of the apparent necessity for an early reply to your question.

First of all, we note, and it is clear, that Section 90.010, RSMo 1959, contains general provisions with respect to the establishment of city parks and authorizes the governing body of the city to acquire such property. Likewise, Section 77.140, RSMo 1959, with respect to third class cities authorizes the governing bodies of such cities to purchase, improve and regulate public parks.

The question has been raised concerning whether or not the provisions of the ordinance with respect to the city council members acting as voting members is in violation of Section 90.520, RSMo 1959.

Section 90.520, RSMo 1959, provides:

Honorable Omer H. Avery

"When any incorporated city or town shall have decided to establish and maintain public parks under sections 90.500 to 90.570, the mayor of such city shall, with the approval of the legislative branch of the municipal government, proceed to appoint a board of nine directors for the same, chosen from the citizens at large with reference to their fitness for such office, and no member of the municipal government shall be a member of the board." (Emphasis added)

The above cited section relates to cities having less than 30,000 population and second and third class cities. It is our understanding, however, that although the City of Fulton had a park board, such park board no longer exists and there was no vote with respect to a tax for public parks under Section 90.500. Although obviously the underscored portion of the provisions expressly excludes members of the municipal government, it appears from the facts that we have here that we are not concerned with that section.

Recreation systems of political subdivisions are authorized by the provisions of Sections 64.750, et seq. Section 64.765, RSMo Supp. 1967, provides:

"The governing bodies establishing a system of public recreation may conduct the same through any existing board or body or may establish a separate recreational board or commission, or park and recreational board or commission, and delegate thereto all administrative powers and responsibilities of the governing body under section 64.750 to 64.780. The board or commission shall consist of not less than five nor more than nine persons. Members shall be appointed by the mayor or other presiding officer of each governing body subject to confirmation by a majority vote of the governing body. Members shall serve for a term of five years or until their successors are appointed and qualified, except that members first appointed shall be appointed for such terms that the terms of not more than two of the members shall expire annually thereafter. Any vacancy shall be filled for the unexpired term in the same manner as an original appointment. Members of the board shall serve without pay. Within

*Transferred:
See 67.750
to 67.780
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Honorable Omer H. Avery

fifteen days after their appointment they shall meet and organize by selecting one of their members as president and by the election of such other officers as they deem necessary. Subject to the approval of the governing bodies, they shall adopt and promulgate the rules and regulations for the conduct, administration and management of the public recreational program."

Section 64.750, RSMo Supp. 1967, containing definitions, states that "governing body" includes the city council. Under the above quoted Section 64.765, the governing bodies may establish a system of public recreation and may conduct the same through any existing board or body or may establish a separate recreational board or commission or park and recreational board and commission.

We take this to mean that the administrative board or commission designated by the council could be a park board if such a board had been created under the provisions of Section 90.520, and clearly, if there were such a board, no member of municipal government could be a member of such board.

The alternate provisions of Section 64.765 with respect to the establishment of a separate board or commission do not contain any specific provisions prohibiting a member of the municipal government from being a member of the board. We note, however, that such board or commission shall consist of not more than nine persons appointed by the mayor and subject to confirmation by a majority vote of the city council. Vacancies are filled in the same manner as original appointments, and the approval of the city council is required for the adoption and promulgation of rules and regulations.

In State ex rel Walker v. Bus, 135 Mo. 325, the Supreme Court held that incompatibility in offices existed where there is "some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control, or assist him." Likewise, in State ex rel Smith v. Bowman, 170 S.W. 700, 184 Mo. App. 549 (1914), the Springfield Court of Appeals held at l.c. 702 that "it is against public policy to allow a body of public officials having the appointive power to fill an office to appoint one of their own number to such office."

Thus, we conclude that a member of the city council cannot be a member of a recreational board or commission or park and recreational board and commission established under Section 64.765.

In addition, it is quite clear that the provisions of the ordinance in question providing for thirteen members of such

Honorable Omer H. Avery

commission is in direct conflict with the provisions of Section 64.765 which limits the membership to nine persons.

We note at this time that Section 64.780, RSMo Supp. 1967, provides:

"The provisions of Sections 64.750 to 64.780 shall not in any way repeal, affect or limit the powers heretofore or hereafter granted to any county, city, township, village or school district, under the provisions of any charter or by law, to establish, maintain and conduct parks and other recreational grounds and public recreation."

As we stated earlier, the city council has the authority to establish and maintain parks pursuant to Sections 90.010 and 77.140. Under these sections, the city council has no power to delegate its legislative authority. In Ex parte Lockhart, 171 S.W.2d 660, 350 Mo. 1220 (1943), the Supreme Court held that a city council may authorize others to do things which the council might properly, but cannot understandingly or advantageously do. However, there is a clear distinction between legislative and ministerial powers in that the former cannot be delegated although the latter may. Neill v. Gates, 54 S.W. 460, 152 Mo. 585 (1899); State ex rel Pritchard v. Ward, 305 S.W.2d 900 (1957).

Inasmuch as certain sections of the ordinance clearly vest the Commission with "legislative" authority, such sections violate these fundamental principles.

We, therefore, are of the opinion that the ordinance is defective for the reasons stated.

Yours very truly,

JOHN C. DANFORTH
Attorney General

cc: Honorable W.C. Murphy
Mayor of Fulton
City Hall
Fulton, Missouri 65251

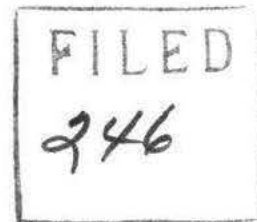
ELECTIONS:
COMMITTEEMEN AND
COMMITTEEWOMEN:

A person may file for election as
a Committeeman or Committeewoman
and also file an additional declara-
tion of candidacy for another state
or county office.

OPINION NO. 246

April 3, 1970

Honorable G. William Weier
Prosecuting Attorney
Jefferson County Court House
P. O. Box 246
Hillsboro, Missouri 64050



Dear Mr. Weier:

This is in response to your opinion request asking:

"May a qualified person file a declara-
tion of candidacy for a township
committeeman, or committeewoman, and
an additional declaration of candidacy
for another state or county office,
prior to the same primary election."

The general election is fixed by both the Constitution
and the statutes as the election held on the first Tuesday
following the first Monday of November in even numbered years,
Article VIII, Section 1, Constitution of Missouri; Section 1.025
(3) RSMo 1959. Section 120.310 of Senate Bill 135 of the
Seventy-Fifth General Assembly provides primary elections shall
be held on the first Tuesday after the first Monday of August
in even numbered years. By law, Committeemen and Committeewomen
are chosen at the August primary election. See Section 120.770,
et seq. RSMo 1959 and RSMo 1967 Supp. The first sentence of
Section 120.370, Senate Bill 135, Seventy-Fifth General Assembly
provides, "No person shall file a written declaration of
candidacy for more than one office to be filled at the next
general election, or under more than one party designation
under which his name is to be printed on the official ballot."

Since Committeemen and Committeewomen are not chosen
at the general election, there is no prohibition against a
person filing a declaration of candidacy for the committee
and a declaration of candidacy for another state or county
office.

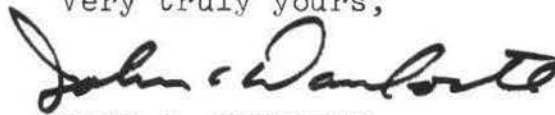
Honorable G. William Weier

CONCLUSION

It is the opinion of this office that a person may file for election as a Committeeman or Committeewoman and also file an additional declaration of candidacy for another state or county office.

The foregoing opinion which I hereby approve was prepared by my Assistant, Charles A. Blackmar.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being more prominent and the last name "Danforth" written in a slightly more compact, cursive style.

JOHN C. DANFORTH
Attorney General

April 20, 1970

Answered by B. J. Jones
OPINION LETTER NO. 249

Mr. G. L. Donahoe
Executive Secretary
The Public School Retirement
System of Missouri
Farm Bureau Building
Jefferson City, Missouri 65101



Dear Mr. Donahoe:

This letter is to acknowledge receipt of your request for an opinion from this office in regard to whether the Board of Trustees of the Retirement System has the authority to sign a lease for office space suitable for the operation of the system and to make payments of the rental for the office space as provided for in the lease.

Subsection 19 of Section 169.020, RSMo Supp. 1967, provides as follows:

"The headquarters of the retirement system shall be in Jefferson City, where office space suitable for the operation of the system shall be provided by the board of public buildings."

In this connection, it is our understanding that office space has been provided in the Farm Bureau Building for more than four years, and that no leases have been executed by the System and no rentals have been paid by the System.

We are also informed that in the Seventy-fifth General Assembly, House Bill No. 147 was introduced and finally passed. After this bill had been finally passed, an error in the drafting of the bill was found, and because of this error, it was subsequently vetoed by the Governor. See attached letter from the Governor to the Secretary of State dated August 19, 1969. Subsection 19 of Section 169.020 in House Bill No. 147 provided that

Mr. G. L. Donahoe -

the Board of Trustees "shall pay any rental charges on the office space so arranged out of funds accruing to the system."

Our attention is also directed to a letter dated March 10, 1970, from the Division of Planning and Construction to the Retirement System enclosing a proposed lease agreement between the Farm Bureau Federation and the Retirement System. The letter indicates that the obligation included under the agreement will be that of the Retirement System and not of the Board of Public Buildings. The letter further states that the appropriations committee of the House of Representatives denied the request for funds to the Board of Public Buildings for payment of obligations under this lease.

Section 31 of Article III of the Missouri Constitution provides that all bills passed by both houses shall be presented to and considered by the Governor, and within fifteen days after presentation, he shall return them to the house of their origin endorsed with his approval or accompanied by his objections. Section 32 of Article III of the Missouri Constitution further provides that every bill presented to the Governor and returned with his objections shall stand as reconsidered in the house to which it is returned. It is only when there is an affirmative vote of two-thirds of the elected members of each house in favor of the measure that the objections of the Governor are overridden and the bill becomes law. Thus, the failure of the legislature to take further action in regard to the Governor's veto of House Bill No. 147, resulted in the bill not becoming law and Subsection 19 of Section 169.020, RSMo Supp. 1967, is still in effect.

It is our view that Subsection 19 of Section 169.020, RSMo Supp. 1967, is still in legal effect and in the absence of any new legislation, the Board of Trustees does not have authority to enter into a lease with the Farm Bureau Federation for office space and to make payments of the rental for the office space as provided for in the lease.

Very truly yours,

JOHN C. DANFORTH
Attorney General

enclosure

Answer by letter-Wood

March 25, 1970

OPINION LETTER NO. 251

Mr. Joseph Jaeger, Jr.
Director of Parks
Missouri State Park Board
P. O. Box 176
1204 Jefferson Building
Jefferson City, Missouri 65101



Dear Mr. Jaeger:

You recently inquired if Section 111.121, V.A.M.S., affects the following buildings or facilities under the jurisdiction of the State Park Board:

- "1. Buildings and/or facilities leased to concessionaires by the State Park Board?
- "2. State Park Board personnel residences?
- "3. State Historic Shrines and Buildings?"

Section 111.121, V.A.M.S., reads as follows:

"The county clerk, board of election commissioners, or other proper election officials having authority over any general, special or local election may designate tax-supported public buildings to be used as polling places, and no official having charge or control of any public building shall refuse to permit the use of the building for election purposes."

It is my opinion that a building owned by the State of Missouri but properly leased by the State Park Board to a private individual or corporation is not a "tax-supported public building" within the contemplation of Section 111.121 during the leased period.

Mr. Joseph Jaeger, Jr.

" . . . 'When a lease is given by the state to an individual or private corporation, the lessee thereby obtains for his or its private use certain rights and privileges in, to and upon such real estate. These rights and privileges constitute private property over which the lessee has, and may exercise, absolute dominion and ownership within the limitations of his or its lease. . . . ' . . . " (Iron County v. State Tax Commission, 437 S.W.2d 665, 670 (Mo. en banc 1968))

It is my further opinion that buildings owned by the State of Missouri and used by the State Park Board solely as dwelling houses or residences by its employees are not "tax-supported public buildings" within the meaning of Section 111.121.

" . . . 'Manifestly that language means a place exposed to the public, and where the public gather together or pass to and fro, and the building referred to means a public one, and belonging to or used by the public for the transaction of public or quasi public business, such as a schoolhouse, courthouse, or other similar one.' . . . " (State ex rel Ferguson v. Donnell, 163 S.W.2d 940, 944 (Mo. en banc 1942))

Finally, it is my opinion that historic buildings owned by the State of Missouri and controlled by the State Park Board for display to the public would be "tax-supported public buildings" as envisioned by Section 111.121.

Yours very truly,

JOHN C. DANFORTH
Attorney General

PLANNING & ZONING:

COUNTY PLANNING & ZONING:

The Cass County Planning Commission may not impose regulations or require permits with respect to lands used or to be used for the raising of crops which may include grassland. This restriction is applicable with respect to land used or to be used for the enumerated purposes and does not extend to land devoted to other uses although owned by the same landowner. The county court may not require permits on the construction or alteration of farm buildings or farm structures. In determining whether to regulate the construction or alteration of a particular building or structure, the use of the building or residence as a farm building or farm structure must be determined by examining the relationship of the building to the farming activities.

OPINION NO. 254

October 6, 1970

Honorable Carl D. Gum
Prosecuting Attorney
Cass County Court House
Harrisonville, Missouri 64701



Dear Mr. Gum:

In your recent letter you requested an opinion from this office with respect to the interpretation of Section 64.620, RSMo 1969. You indicated therein:

"We have particular reference to the following sentence that is contained in this section, which is: 'The provisions of Sections 64.510 through 64.690 should not be exercised so as to impose regulations or to require permits with respect to land, used or to be used for the raising of crops, orchards or forestry or with respect to the erection, maintenance, repair, alteration or extension of farm buildings or farm structures.'"

With regard to the above language, you asked two questions, the first of which is as follows:

"Would this quoted part of this section mean that the Cass County Planning Commission has no jurisdiction to apply or enforce our zoning regulations on any land in the county used or to be used for the raising of crops, orchards or forestry? The meaning of orchards and forestry would seem clear enough, but the meaning

Honorable Carl D. Gum

of the word 'crops' could extend even to grass, and would therefore preclude any regulation on any farm that maintained any grass, which would be about all inclusive."

In addition to the language previously quoted from Section 64.620, RSMo 1969, the section provides in part as follows:

"For the purpose of promoting health, safety, morals, comfort or the general welfare of the unincorporated portion of counties of the second or third class to conserve and protect property and building values, to secure the most economical use of the land, and to facilitate the adequate provision of public improvements all in accordance with a comprehensive plan, the county court of any county to which sections 64.510 to 64.690 are applicable as provided in section 64.510 shall have power after approval by vote of the people as provided in section 64.530 to regulate and restrict, by order of record, in said unincorporated portions of the county, the height, number of stories, and size of buildings, the percentage of lots that may be occupied, the size of yards, courts and other open spaces, the density of population, the location and use of buildings, structures and land for trade, industry, residence or other purposes, including areas for agriculture, forestry, and recreation. The provisions of sections 64.510 to 64.690 shall not be exercised so as to impose regulations or to require permits with respect to land, used or to be used for the raising of crops, orchards or forestry or with respect to the erection, maintenance, repair, alteration or extension of farm buildings or farm structures. The powers granted by sections 64.510 to 64.690 shall not be construed (1) so as to deprive the owner, lessee or tenant of any existing property of its use or maintenance for the purpose to which it is then lawfully devoted; . . ." (Emphasis ours)

This section indicates that it was intended by the legislature that the county court should have power to regulate and restrict unincorporated portions of the county including those areas used for agriculture, forestry and recreation purposes.

Honorable Carl D. Gum

However, the specific language which you cite provides that the county courts shall not exercise their zoning power so as to impose regulations or to require permits with respect to land, used or to be used for the raising of crops, orchards or forestry. You state that you are not certain whether "crops" include "grass" and ask whether if crops include grass, that would preclude "any regulation on any farm that maintained any grass."

Initially, it should be noted that the restriction imposed upon the county court extends under this provision only to land used or to be used for the enumerated purposes. Therefore, this restriction applies only to that portion of a particular farm which is used or to be used for crops, orchards or forestry. It does not exempt an entire farm from regulation unless the entire farm is devoted to the described use.

For most purposes, the term "crops" is readily understood. Thus, such commodities as corn, tobacco, cotton, and soybeans are often referred to as crops and were no doubt in the contemplation of the legislature.

Whether land devoted to grass was intended to be within the exemption is to be resolved by determining if the term "crops" includes lands devoted to that purpose. In determining the meaning of crops it is well to note:

"In determining the meaning of an ordinance or statute pertaining to zoning, as well as other subjects, the courts generally seek to ascertain the intention of the lawmakers by giving the words used their ordinary meaning, by considering the entire acts and its purposes, and by seeking to avoid unjust, absurd, unreasonable, confiscatory or oppressive results. . . ." Suburbia Gardens Nursery, Inc. v. County of St. Louis, 377 S.W.2d 266, 271 (Mo. En Banc 1964)

We could find no comprehensive definition of the term "crop" in the reported Missouri decisions.

Crop is defined in Webster's New International Dictionary, Second Edition, as follows:

"4. Of grain or fruit, that which is cropped, cut, or gathered from a single field, or of a single kind, or in a single season or part of a season; harvest, also, the state of yielding crops; cultivation; as, to be in or out or crop."

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Thus the term is used in conjunction with the exercise of labor to obtain the yield from land of a commodity. The above definition seems to indicate that a significant element in determining whether a commodity is to be viewed as a crop is a determination as to whether the particular product is harvested.

This definition obtained some support from Venie v. South Central Enterprises, Inc., 401 S.W.2d 495 (Spr.Ct.App. 1966) in which the court defined the term "annual crop." The court there emphasized the "annual labor and cultivation" of the farmer.

In Wimp v. Early, 78 S.W. 343 (St.L.Ct.App. 1904), plaintiff, a landlord, sought to recover the value of timothy seed from a party who purchased "any part of a crop known by him to have been grown on the landlord's premises." It is clear from an examination of the opinion that the decision is based upon the conclusion of the court that timothy seed is a crop. Furthermore, the court stated:

" . . . It was proper to receive any testimony tending to show consent to the sale of the entire crop, for that would include the seed. . . ." loc. cit. 78 S.W. 343, 345

Prior to the last quoted portion of the opinion, the court had noted that the hay grown on the premises had been previously sold. Thus, the seed from the grass and hay harvested may be viewed as a crop.

Since grass is a commodity which occurs naturally and by design and at times is harvested, it would appear that no all-inclusive definition is possible. That is, although grass is planted and cultivated as a lawn, we do not believe that grassland, there, is to be viewed as land devoted to the raising of a crop. However, where grass is sown to produce a hay crop and is cut and baled, such land would seem to be included in the definition.

It is our opinion that the terms utilized by the legislature were intended to permit each farmer to determine what agricultural commodity is to be grown on his land. As to that land, the county court may not require permits or impose regulations. Where the land is devoted to agricultural purposes, we think the word "crops" should be defined to include grasslands. However, this exemption extends only to that portion of a landowner's property which is devoted to the uses set forth in the statutes.

The second question you asked is as follows:

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"Heretofore, we have been requiring permits on the construction or alteration of both residences and farm buildings or farm structures, without taking into account whether or not the lands were used for crops, orchards or forestry, and are wondering whether or not we have in our jurisdiction to do so, and whether or not we should continue to do so."

Section 64.620, RSMo 1969, provides, in part:

". . . The provisions of sections 64.510 to 64.690 shall not be exercised so as to impose regulations or to require permits . . . with respect to the erection; maintenance, repair, alteration or extension of farm buildings or farm structures. . . ."

This exemption extends only to "farm buildings or farm structures." Thus, once it is determined that a particular structure or building is a farm building or farm structure, then under the specific terms of the statute, the county court may not require permits or impose regulations upon the erection, maintenance, repair, alteration or extension of such a building or structure.

The first portion of the exemption exempts land in certain circumstances, and the second portion exempts buildings or structures where they are properly considered to be denominated as farm buildings or farm structures.

In determining what structures are to be deemed as farm structures, the same standard of interpretation should be utilized as that set forth above in Suburbia Gardens Nursery, Inc. v. County of St. Louis, supra.

With regard to specific structures, it would seem necessary to determine if that structure or building is to be functionally used in the farm operation.

Thus, if a silo was constructed to retain the produce of the farm, it would seem to be a farm structure. However, if a farmer would construct a restaurant, such structure would not be within the exemption even though it was erected by a farmer since the restaurant has no relationship to the operation of a farm.

In determining what use is within the term "farming," the courts look to what is incidental to a farming operation. In 101 C.J.S., Zoning, Section 157. it is stated:

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"The test of whether or not a use not normally considered farming is 'farming' is within a zoning regulation permitting farming is whether such use is incidental to farming operations or is an independent or dominant enterprise.
. . ."

It has been held that a residence for a farmer is such an incidental use.

In Rice v. Board of County Commissioners of Benson County, 135 N.W.2d 597, 600 (N.D. 1965) a taxpayer objected to the assessment of taxes upon his residence which was located upon a 64-acre tract within a city, but which was used in conjunction with a 784-acre farm. In reaching its decision the court stated:

". . . There is no question but that the 64-acre tract is an integral part of a farm unit and that the residence located on it is the home of the owner and operator of the farm. It is a farm building in the same sense that the home of any farm owner and operator located outside the city limits is a farm building.
. . ." loc. cit. 135 N.W.2d 597, 600

Similarly, in Kroeger v. Bohrer, 91 S.W. 159, 160 (St.L.Ct. App. 1905) the court determined whether a notice to vacate was sufficient. The question framed by the court was as follows:

"The question in the case is to determine to which class of tenancies the premises in controversy belong. If classed as agricultural lands, the notice to quit was insufficient, and the judgment should be affirmed; if classed as houses within a city, the notice was sufficient, and the judgment should be reversed.
. . ." loc. cit. 91 S.W. 159, 160

If classed as agricultural land, the tenancy would fall within a statute which specifies a different method of terminating leases than would ordinarily apply, the court stated:

". . . We do not think that lands devoted to agriculture, though within the limits of a city, town, or village, and with a dwelling house upon them, are included in the section.
. . ." loc. cit. 91 S.W. 159, 161

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Thus, the court clearly intended to include the farm residence as being within the doctrines applicable to leases upon farms and lands devoted to agricultural purposes.

Where a business is permitted under a zoning ordinance, the courts will permit activities "when such use or activity is performed as an integral and essential part" of the business. Suburbia Gardens Nursery, Inc. v. County of St. Louis, supra.

Thus, the question is whether a "farm building" is ordinarily thought to include a farm residence given the ordinary meaning of that term. Although some farms may not have a residence associated with it, most persons anticipate a residence in which the farmer lives which is located on the farm.

Thus, it is our opinion that a residence of a person located on lands devoted to farm use and which is incidental to the operation of the farm, is exempt from the operation of Section 64.620.

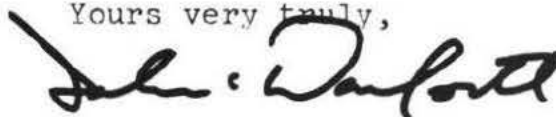
CONCLUSION

The Cass County Planning Commission may not impose regulations or require permits with respect to lands used or to be used for the raising of crops which may include grassland. This restriction is applicable with respect to land used or to be used for the enumerated purposes and does not extend to land devoted to other uses although owned by the same landowner.

The county court may not require permits on the construction or alteration of farm buildings or farm structures. In determining whether to regulate the construction or alteration of a particular building or structure, the use of the building or residence as a farm building or farm structure must be determined by examining the relationship of the building to the farming activities.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Craft.

Yours very truly,



JOHN C. DANFORTH
Attorney General

magistrate

August 25, 1970

OPINION LETTER NO. 256

(Answered by letter-Nowotny)

Honorable Hugh A. Sprague
Prosecuting Attorney
Buchanan County Court House
St. Joseph, Missouri 64501

Dear Mr. Sprague:

This is in response to your request, through Assistant Prosecuting Attorney Mr. William E. Alberty, for an opinion of this office relating to the following question:

" * * * The Fifth Judicial Circuit has recently been expanded and now includes three counties, whereas, before, only Buchanan County was included. As a result of this recent expansion, do the Magistrate Courts located in the Fifth Judicial Circuit now have jurisdiction to hear applications for Hardship Driving Privileges?"

Subparagraph 1 of paragraph 3, Section 302.309, RSMo 1969, reads as follows:

"All circuit courts and magistrate courts located in counties which are a part of a multi-county judicial circuit shall have jurisdiction to hear applications for hardship driving privileges."

As indicated above, the Fifth Judicial Circuit is now a multi-county judicial circuit. Under the guidelines set forth in Section 1.090, RSMo 1969, which states that words and phrases shall be taken in their plain or ordinary and usual sense, we feel compelled to conclude that the portion of Section 302.309 referred to above

Honorable Hugh Sprague

confers jurisdiction upon magistrate courts in the Fifth Judicial Circuit to hear applications for hardship driving privileges.

Very truly yours,

JOHN C. DANFORTH
Attorney General

PATHOLOGY:
PHYSICIANS AND SURGEONS:
DOCTORS:

Pathology is a branch of the practice of medicine within the provisions of Chapter 334, RSMo, and a profession under the jurisdiction of the State Board of Registration for the Healing Arts, and that an individual must be licensed by the Board before he can lawfully practice pathology. The prosecuting and circuit attorneys have the responsibility for criminal prosecutions arising out of violations of said chapter.

OPINION NO. 257

June 1, 1970

Honorable P. Wayne Goode
State Representative
7400 North Broadway
St. Louis, Missouri 63147



Dear Representative Goode:

This opinion is in response to your letter in which you inquire as follows:

- "1. What are the qualifications necessary for an individual to practice pathology in the State of Missouri.
- "2. If an individual may practice pathology with a 'temporary license for training,' can he do so outside of the institution in which he is training.
- "3. What agency or agencies are responsible to enforce the law as it applies to the above, and what is the responsibility of local law enforcement agencies, County Prosecuting Attorney, the Board of Registration for the Healing Arts, and the office of Attorney General in this enforcement."

We first of all wish to note that Section 334.010, RSMo 1969, with respect to physicians and surgeons states as follows:

"It shall be unlawful for any person not now a registered physician within the meaning of the law to practice medicine or surgery in any of its departments, or to profess to cure and attempt to treat the sick and others

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afflicted with bodily or mental infirmities,
or engage in the practice of midwifery in
this state, except as herein provided."

While the legislature in enacting the above section obviously did not attempt to designate the various branches of medicine or surgery, the intent is clear that in order to protect the public the terminology used should be given a broad construction.

Ballentine's Law Dictionary, Second Edition (1948), p. 942, defines pathology as follows:

"That part of the science of medicine which explains the nature of diseases, their causes and symptoms. A pathological condition means neither more nor less than a diseased condition of the body."

70 C.J.S., Physicians and Surgeons, §1, p. 813, defines pathology as:

"That part of medicine which explains the nature of diseases and their causes and symptoms; the science treating of diseases, their nature, causes, progress, manifestations and results."

And, in the footnote from the same citation, the definition of pathology is given as:

"The science treating of diseases, their essential nature, causes, and development, and the structural and functional changes produced by them. Stroud v. Crow, 136 S.W.2d 1025, 1027, 199 Ark. 814."

Likewise, from the same C.J.S. citation, "pathological training involves the study of chemicals and the reaction of different chemicals when put together, gasses, etc."

The Encyclopedia Britannica, 14th Edition, Volume 17, p. 376, states that pathology includes:

"Almost anything which has to do with disease, and its field including aetiology, pathogenesis, morbid anatomy, microscopic histology, parasitology, functional changes, chemical alterations, and indeed any topic, except diagnosis and treatment which was open to fairly accurate study."

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And, as described in the Columbia Encyclopedia, Third Edition, p. 1611, pathology is the:

"Study of modifications in function and changes in structure produced in any organ or part of the body by disease. The changes in tissue include degeneration, atrophy, hypertrophy, and inflammation."

We understand that pathologists jointly participate with the patient's attending physician in evaluating what diagnosis the laboratory data suggest or exclude and how the data may be used in deciding what therapy may be best for the patient. The pathologist supervises the performance of various laboratory tests, maintains surveillance as well as quality control, and takes the responsibility for their accuracy.

It also appears that various publications of the American Medical Association have over the last several decades contained resolutions recognizing pathology as a specialty of medicine; e.g., the May 27, 1939, Journal of the American Medical Association stated:

"Resolved, that the American Medical Association specifically recognizes the fact that clinical pathology as a specialty of medicine and believes that those persons who practice it and who act as directors of clinical laboratories must be graduates of recognized medical schools and licensed to practice medicine in their respective states; and further be it

"Resolved, that only to the nature of the subject, the American Medical Association recognizes that it is necessary for the persons to complete at least three years of adequate training in clinical pathology, in addition to the training which they have received in regular courses in medical schools, before assuming the directorship of clinical laboratories."

In 1964 the House of Delegates of the American Medical Association adopted the principles substituted by its reference committee as follows:

"The practice of anesthesiology, pathology, physical medicine and radiology are an

Honorable P. Wayne Goode

integral part of the practice of medicine in the same category as the practice of surgery, internal medicine or any other designated field of medicine."

The American Medical Association has published the "Requirements for Certification, American Specialty Boards," Revised to June 30, 1969, which with respect to the American Board of Pathology states in part under "general requirements" that:

- "1. The candidate must possess moral and ethical standing in the medical profession.
- "2. The candidate must hold a license to practice medicine in the country in which he plans to reside.
- "3. The candidate must devote professional time principally and primarily to pathology."

Other references with respect to the scope of the practice of pathology include "An Introduction to Pathology" by G. Payling Wright, Professor of Pathology, Guy's Hospital Medical School, University of London; "How Does a Pathologist Make a Diagnosis?" Editorial, Arch Path - Vol. 84, October, 1967; "A Textbook of Pathology Structure and Function in Diseases" by William Boyd, 7th Edition.

In Granger v. Adson, 250 N.W. 722 (Minn. Sup. 1933), the Supreme Court of Minnesota stated at page 723:

"It is settled law in this state that:
'The science of diagnosing human diseases and human ailments has come to be a distinct branch or department of the medical profession; the diagnostician limiting his efforts to a discovery of the disease or ailment from which a patient may be suffering, its character and location, leaving the treatment thereof to some other physician or surgeon. This is a matter of common knowledge. And it requires no discussion or argument to demonstrate that the physician who thus applies his learning and energies is performing a highly important duty of the profession, and is engaged in the practice thereof, though he prescribes no drug and administers no specific treatment.' State v. Rolph, 140 Minn. 190, 167 N.W. 553, 554, L.R.A. 1918D, 1096."

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The role of the medical specialist in expert pathological testimony has been recognized in York v. Daniels, 259 S.W.2d 109 (Mo. Springfield Appeals 1953), Agnew v. City of Los Angeles, et al, 218 P.2d 66 (DC App., Calif. 1950), and Burnstein v. Alameda-Contra Costa Medical Association, 293 P.2d 862 (DC App., Calif. 1956).

The practice of pathology by corporate entities has been held to be unlawful as being the practice of medicine. Opinion by Solicitor General of the State of Iowa to Secretary of State, May 1, 1969, also decision and opinion of the District Court of the State of Iowa in and for Polk County, No. 63095 Equity Division, Iowa Hospital Association v. Iowa Board of Medical Examiners (November 28, 1955).

Likewise, in Guardian Life Insurance Co. of America v. Richardson, 129 S.W.2d 1107 (Court of Appeals, Tenn. 1939), the court stated at l.c. 1116:

"In the view we take of the insurance contract, it is necessary to ascertain whether there is material evidence reasonably tending to show that plaintiff is totally and permanently disabled by 'bodily' disease, as distinguished from mental disease; and this presents an issue involving the pathology of disease, that is, 'the science treating of diseases, their nature, cause, progress, manifestations and results'. Webster's International Dictionary. Such issues are to be determined upon the testimony of qualified medical expert witnesses. American National Insurance Co. v. Smith, 18 Tenn. App. 222, 227, 74 S.W.2d 1078; Standard Life Insurance Co. v. Strong, 19 Tenn. App. 404, 424, 87 S.W.2d 367, 380; National Life & Accident Insurance Co. v. Follett, 168 Tenn. 647, 80 S.W.2d 92. See also, numerous cases cited in Jones on Evidence (2nd Ed.), Vol. 1, page 812, Footnote 8."

Generally speaking, of course, one is practicing medicine when he visits his patient, examines him, determines the nature of the disease, and prescribes the remedy he deems appropriate, and one professing to be able to ascertain by examination of his patient the cause of his trouble, and to indicate the proper treatment is practicing medicine. State v. Smith, 233 Mo. 244, 135 S.W. 465 (1911).

Honorable P. Wayne Goode

At the same time, however, it becomes clear that the practice of medicine need not contain all of the elements found to exist in State v. Smith. That is, if laymen were to individually practice segmented functions of a medical nature arriving at a collective result, they would be none the less practicing medicine. It is thus that we view the practice of pathology as containing at least one if not more of those elements required for determining whether one is practicing medicine.

It has been suggested that the courts might distinguish between cases where the "pathologist" actually sees the patient and performs some operation or test on him and cases where the pathologist merely examines the matter submitted to him by a physician and has no contact with the patient. However, it is our view, broadly speaking, that the diagnosis of pathological conditions constitutes the practice of medicine and cannot be performed by a lay person.

We are not stating that every individual who makes tests, studies or reaches findings within the area of "pathology" is practicing medicine. Obviously various technologists perform functions in the area of pathology that cannot be considered reserved to the pathologist. Whether such persons are practicing medicine must be determined by the facts of the particular case.

In answer to your second question, requirements for temporary licensure of physicians and surgeons are contained in Chapter 334 and in particular Section 334.045, RSMo 1967 Supp., which states in full as follows:

"1. Notwithstanding any other provisions of law, the board may grant a temporary license to any otherwise qualified physician to practice as a physician and surgeon in state maintained hospitals or other hospitals approved by the board, even though such person is not a citizen of the United States but is legally authorized to practice under the laws of another state, territory or foreign country and who meets such other requirements as the board may prescribe.

"2. The temporary license provided for in subsection 1 shall limit the right of the licensee to practice only in the state maintained hospitals or other hospitals approved by the board, under the supervision of the superintendent or chief of staff of such institution, and shall be renewable annually

Honorable P. Wayne Goode

in the discretion and with the approval of the board, provided, however, that no fees for services rendered shall be charged by the temporary licensee nor by the hospital where he is employed for services performed by such temporary licensee. A fee in the amount of five dollars shall accompany the original application for temporary license and a similar amount shall be paid annually in the event the temporary license is renewed."

Licenses for the practice of medicine and surgery are required by Section 334.010, RSMo et seq., as amended; and we know of no "temporary license for training" other than that set out in Section 334.045, above, which is self-explanatory.

In answer to your third question, the Board of Registration for the Healing Arts is responsible for the licensing of physicians and surgeons, Chapter 334, RSMo.

The Board of Registration for the Healing Arts is a State Board, and as such is represented by the Attorney General, Chapter 27, RSMo.

The responsibility for criminal law enforcement for violations of the provisions of Chapter 334 is in the prosecuting and circuit attorneys, Chapter 56.

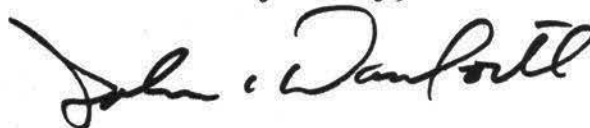
CONCLUSION

It is the opinion of this office that "pathology" is a branch of the practice of medicine within the provisions of Chapter 334, RSMo, and a profession under the jurisdiction of the State Board of Registration for the Healing Arts, and that an individual must be licensed by the Board before he can lawfully practice pathology.

The prosecuting and circuit attorneys have the responsibility for criminal prosecutions arising out of violations of said chapter.

The foregoing opinion, which I hereby approve, was prepared by my assistant John C. Klaffenbach.

Yours very truly,



JOHN C. DANFORTH
Attorney General

May 11, 1970

OPINION LETTER NO. 259

Honorable J. Anthony Dill
State Representative
8011 Grandvista
Affton, Missouri 63123



Dear Representative Dill:

This is in reply to your request for an opinion of this office in which you asked:

"I would appreciate knowing if an individual is entitled to a refund on any Missouri inspection stickers which he purchased from the Missouri State Highway Patrol in the event he is no longer an inspector under the Missouri Vehicle Inspection Law passed by the 75th General Assembly."

The applicable sections under consideration in regard to your question are Sections 307.350 through 307.390, V.A.M.S., having been renumbered by the Revisor of Statutes from Sections 304.700 through 304.780, RSMo Supp. 1967. A full reading of the aforementioned sections fails to reveal any legislative intent to provide for the refunding of the purchase price paid by official inspection stations for certificates of inspection and approval. As is apparent from a reading of the sections involved herein, there are but two vague references which might control in this instance:

"All owners of motor vehicles and trailers as defined in section 301.010, RSMo, which are required to be registered in this state, except trailers registered for a gross weight of three thousand pounds or less, and also except historic motor vehicles registered under section 301.131, RSMo, must submit their motor vehicles and trailers to an annual inspection of their mechanisms and equipment in accordance with the provisions of sections 307.350 to 307.390 and obtain a

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certificate of inspection and a duplicate thereof from a duly authorized official inspection station. The inspection, except the inspection of school buses which shall be made at the time provided in section 307.375, shall be made at the time prescribed in the rules and regulations issued by the superintendent of the Missouri state highway patrol; but the inspection of a motor vehicle or trailer shall not be made more than thirty days prior to the day on which the annual registration fee for the motor vehicle or trailer is paid. The certificate of inspection and approval shall be a sticker, seal, or other device or combination thereof, as the superintendent of the Missouri state highway patrol prescribed by regulation and shall be displayed upon the motor vehicle or trailer as prescribed by the regulations established by him. The replacement of certificates of inspection and approval which are lost or destroyed shall be made by the superintendent of the Missouri state highway patrol under regulations prescribed by him."

The references in Section 307.350 to replacement of certificates are obviously intended to cover the loss or destruction of the inspection sticker by the ultimate purchaser and not by the inspection station, and thus the conclusion to be drawn is that there is no authority within Section 307.350 for a refund of purchase price on stickers purchased by inspection stations.

A further section of the Motor Vehicle Safety Inspection Act deals with the purchase price to be paid in inspection stations for certificates of inspections. Section 307.365 (5) provides in part as follows:

" . . . The superintendent of the Missouri state highway patrol shall collect a fee of 50 cents for each certificate of inspection and duplicate issued to the official inspection stations except that no charge shall be made for certificates of inspection and approval and duplicates issued for official inspection stations operated by governmental entities. All fees collected shall be deposited in the state treasury to the credit of the state highway fund. . . ."

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As can be seen from the foregoing, no provision is made for the refunding of purchase price of inspection stickers to inspection stations, and again the conclusion must be drawn that the legislature did not contemplate refunding in such an instance.

Therefore, it is the conclusion of this office then that an inspection station under the Missouri Motor Vehicle Safety Inspection Act which ceases to be an inspection station either voluntarily or by revocation of its license, may not have the purchase price for certificates of inspection refunded to it.

Yours very truly,

JOHN C. DANFORTH
Attorney General

COUNTIES:
COUNTY COURT:
COUNTY FUNDS:
ROADS AND BRIDGES:

County road and bridge funds cannot be transferred to the general revenue fund of the county and then used to pay the salary of the different county officials and employees for any services rendered by them.

OPINION NO. 260

October 6, 1970

Honorable Jack E. Gant
State Senator
District No. 16
9517 East 29th Street
Independence, Missouri



Dear Senator Gant:

This is in response to your request for an opinion on the following question:

The county court of Jackson County has made it a practice to charge the special road and bridge fund for certain county services performed in conjunction with the administration of that fund. The cost of these services can be loosely termed "administrative expenses." Does the county court have the authority to make such a charge against the special road and bridge fund, and transfer the costs of administrative services from the special road and bridge fund to the county general fund?

The factual situation upon which the opinion request is based is as follows. The administrative assistant to the Jackson County Court conducted a study to determine the cost of the production of services to the various county funds (park fund, health fund, special road and bridge fund). From that study, the Jackson County Court instituted the practice of charging each of the funds for the amount of county services provided to the funds. The services rendered each of the various funds of Jackson County, other than the general fund, consisted of payroll preparation; the collection, distribution, investment and management of services involved in the employees' pension plan; maintenance of personnel records; provisions for hearing of employee grievances; labor negotiations; personnel investigations; preparation of construction and purchase contracts; planning of programs for future implementation; provi-

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sions for health insurance benefits; credit union deductions and payouts; general administrative and legal counseling; emergency purchasing; computer programming and printouts; internal communications; legal opinions and preparation of orders evidencing court action; representation in litigation; audit and inventory services; transfer of appropriations within funds; and other miscellaneous services that are necessary for the implementation of any county program. (Memorandum to this office from Mr. J. T. Reid, County Counselor of Jackson County, April 6, 1970). For the purposes of this opinion, these services will be termed "administrative services," and their cost will be termed "administrative expenses." The Jackson County Court concluded from their studies that each of the special funds of the county used a portion of administrative services in direct relation to the size of the particular fund in question. The county court then instituted the practice of "charging" each fund a certain percentage of the amount in that fund for the above stated administrative services. It is assumed by this office that this charge was instituted by transferring the administrative expenses from the special fund to the general fund and issuing county warrants on the general fund to pay the expenses described. The effect of this assumption is best illustrated by an example. Assume that a secretary employed by the Jackson County Court spends fifty percent of her time working on matters concerning the special road and bridge fund, and fifty percent of her time working on other county matters. It is assumed that the secretary would be paid by a single warrant issued on the general fund of the county, and an amount equal to fifty percent of the secretary's salary would be transferred from the special road and bridge fund to the general fund. This is contrasted to the situation where the secretary would receive two warrants, one drawn upon the general fund and one drawn upon the special road and bridge fund, each warrant constituting fifty percent of the secretary's salary. However, the latter situation, solely with the respect of the use of special road and bridge funds, will also be considered in this opinion.

Section 1, Article X of the Missouri Constitution gives local governments, including counties, the authority to levy taxes for county purposes. Section 11(a) of Article X gives counties the power to levy taxes on property. Section 11(b), Article X of the Missouri Constitution limits the rates of taxation that counties may impose upon property within the county's taxing power. The aforementioned limit is thirty-five cents on the hundred dollars assessed valuation in counties having three hundred million dollars or more assessed valuation, and fifty cents per hundred dollars assessed valuation in all other counties. However, in addition to this limit on county property taxes, Section 12(a) of Article X authorizes counties to levy an additional tax, not exceeding thirty-

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five cents on each one hundred dollars assessed valuation, "to be used for road and bridge purposes." Pursuant to the aforementioned constitutional authority, the General Assembly enacted Section 137.555, RSMo 1969, which provides in pertinent part:

"In addition to other levies authorized by law, the county court in counties not adopting an alternative form of government and the proper administrative body in counties adopting an alternative form of government, in their discretion may levy an additional tax, not exceeding thirty-five cents on each one hundred dollars assessed valuation, all of such tax to be collected and turned into the county treasury, where it shall be known and designated as 'The Special Road and Bridge Fund' to be used for road and bridge purposes and for no other purpose whatever; . . ." (Emphasis added)

Section 137.560, RSMo 1969, declares that the funds provided for in Section 137.555 shall be shown as a separate item on all the financial, budget and other accounting statements of the county, and the funds shall be specifically and expressly shown on all such statements as the "Special Road and Bridge Fund" of the county. Section 50.550, RSMo, emphasizes that the annual budgets of all class one counties (Jackson County) show that all receipts from the special tax levy for roads and bridges are being kept in the special fund created for that purpose. All of the aforementioned statutes evidence a clear intent on the part of the legislature to keep receipts from the special road and bridge tax completely separate from all other county funds, and also to allow those funds to be used solely for road and bridge purposes.

Section 137.065, RSMo 1969, authorizes the county court to levy taxes for county purposes as provided in Article X, Section 11(b), Constitution of Missouri, 1945.

Our opinion is restricted to the use of road and bridge funds to pay administrative expenses to public offices in connection therewith, on the theory that these services come within the official duties of the county clerk or county court or other public officials.

Two questions arise concerning the expenditure of funds that can be used only for road and bridge purposes. First, what expenditures can be legally considered as being used for road and bridge purposes. Second, assuming that such expenditures are for

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road and bridge purposes are they, under the facts, illegal expenditures for another reason.

We believe from the information submitted that most if not all of the administrative services referred to are to be performed by the county clerk or other public officials. Likewise, our opinion is restricted to the question of the county clerk or other public official receiving compensation from the road and bridge fund for services performed by his office in connection therewith.

In *State ex rel. Linn County v. Adams*, 172 Mo. 1 (1903), the county clerk kept from the fees he collected fees for his services as clerk of the county board of equalization. The court held he was entitled to the per diem of three dollars per day as a member of the board of equalization but was not entitled to the fees he retained for acting as secretary of the board because those were his duties as county clerk. The court stated, l.c. 7-8:

"In order to maintain this proposition some statute must be pointed out which expressly or by necessary implication provides such compensation for such officer. For it is well settled law, that a right to compensation for the discharge of official duties, is purely a creature of statute, and that the statute which is claimed to confer such right must be strictly construed. [*Jackson County v. Stone*, 168 Mo. 577; *State ex rel. v. Wallbridge*, 153 Mo. 194; *State ex rel. v. Brown*, 146 Mo. 401; *State ex rel. Wofford*, 116 Mo. 220; *Givens v. Daviess Co.*, 107 Mo. 603; *Gammon v. Lafayette Co.*, 76 Mo. 675.]

"A mere application of these principles to the statute determines the question in hand. No provision is therein to be found giving any compensation to the secretary of the board of equalization. The county clerk is by the statute made ex officio a member of the board, and its secretary, but no clerical duties are imposed upon him, and no provision made for compensation for any clerical duties to be performed by him. As a member of the board he is allowed \$3 per day while acting as such member, and no longer, and so the circuit court correctly ruled and allowed him \$12, or three dollars per day as a member of the board for the whole time he could have acted as such member.

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"The clerical duties required to be performed in connection with the action of the board, for which Adams also received pay from the county in addition to said sum of twelve dollars, were imposed upon him not as a member of the board, nor as secretary thereof, but as county clerk. And in the act imposing those duties no provision is made for compensation for his services in performing them, and but for the provisions of section 3239, allowing fees for such services to him as county clerk, he would have no right to any compensation whatever therefor. He can point to said section 3239 as authorizing the compensation to him as county clerk for the clerical services for which he charged the county; but he can point to no statute authorizing such compensation to him as secretary of the board of equalization. Hence, the circuit court correctly held that he was entitled to such compensation as county clerk, and not as secretary of the board of equalization. The contention of the defendant receives no support from the case of State ex rel. McGrath v. Walker, 97 Mo. 162, to which we are cited. In that case there was a statute expressly providing a per diem compensation for the members of the state board of equalization (R.S. 1879, sec. 6669), and the only question was whether the Secretary of State, in view of the constitutional provision as to the salary of such officer, was entitled to such per diem compensation."

In Nodaway County v. Kidder, 129 S.W.2d 857 (1939) suit was brought to recover from the presiding judge of the county court money he received as compensation and expenses in addition to his salary. He contended he was paid as an employee of the county for inspecting roads, bridges, and other work. In discussing this matter the court stated, l.c. 860:

"The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too must be strictly construed as against the

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officer. State ex rel. Evans v. Gordon, 245 Mo. 12, 28, 149 S.W. 638; King v. Riverland Levee Dist., 218 Mo.App. 490, 493, 279 S.W. 195, 196; State ex rel. Wedeking v. McCracken, 60 Mo.App. 650, 656.

"It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. State ex rel. Buder v. Hackmann, 305 Mo. 342, 265 S.W. 532, 534; State ex rel. Linn County v. Adams, 172 Mo. 1, 7, 72 S.W. 655; Williams v. Chariton County, 85 Mo. 645.

"The duties performed by appellant, and for which the additional fee or salary and mileage was paid, were with reference to matters pertaining to and relating to his official duties as presiding judge of the county court and said services were within the scope of said official duties. The work in which appellant was engaged was directly under the supervision of the county court. Public policy requires that a public officer be denied additional compensation for performing official duties.

"It has been held that employment as city attorney, for which a salary was paid, includes services rendered in connection with a special tax matter, and that compensation as city attorney covers such service, and that a city collector may not contract with such city attorney for additional compensation for services in such matters. Edwards v. City of Kirkwood, 162 Mo. App. 576, 579, 142 S.W. 1109."

Under Section 51.120, RSMo, the county clerk is the clerk of the county court. It is his duty to keep an accurate record of the orders, rules and proceedings of the county court and an accurate account of all moneys coming into his hands on account of fees, costs or otherwise, and pay the same to the persons entitled thereto. Under Section 51.150, RSMo, it is his duty to keep just accounts between the county and all persons chargeable with moneys payable into the county treasury, or of persons that may become entitled to receive moneys therefrom, and to file and preserve in his office all accounts, vouchers, and other papers pertaining to the settlement of any account to which the county is a party, and to issue warrants on the treasury for all money orders paid by the county court and keep an abstract thereof.

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Section 50.330, RSMo 1969, provides that any salary provided for county officers, deputies and assistants shall be paid monthly by warrants drawn on the county treasury.

Section 51.280, RSMo 1969, provides the county clerk of Jackson County shall receive "as compensation for all services performed by him an annual salary of six thousand seven hundred dollars." It also provides an additional salary for duties imposed by this statute in issuance of all county licenses and collecting the fees for the same an additional sum of five thousand dollars to be paid as other county salaries are paid. Section 51.430, RSMo 1969, provides for the appointment of deputies, clerks, etc., and provides for their salaries.

Under Chapter 229, RSMo 1969, when any public money is to be expended on public roads or bridges, the county court, township board or road commissioner, as the case may be, has full authority to construct, maintain, purchase machinery, necessary materials and employ the necessary help.

Certainly, it is the duty of the county court by statute to have accurate and adequate records of their proceedings dealing with the county roads and it is the duty of the county clerk to keep all the necessary records. We are unable to find any statute that authorizes the county clerk to receive any additional compensation for such services or any statute authorizing the county road and bridge fund to be used to compensate him or any other public officer for any services rendered by them for the county court in the performance of their duties in connection with the county roads including all necessary records to be kept by the county court.

As heretofore stated, it appears most of the services mentioned herein are services that the public officials of Jackson County are under legal obligation to perform under their official duties of their office and for which they are compensated by their salary which is paid from the general revenue of the county. Without passing on each of the itemized services mentioned in this opinion, it is our view that no public official can be compensated from the road and bridge fund for performing a service or duty he is under legal obligation to perform by virtue of his office; such as auditing by the county auditor, legal advice and representation by the county counselor, and similar services by other public officials. *Linn County v. Adams*, supra.

It is our view, for example, that the county counselor is required to do all the legal work for the county, whether it involves road and bridge matters or other matters, for which he is compensated from the general revenue of the county. His salary is to

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be paid from the general county revenue, and there is no statutory provision for it to be paid from any other fund. The same is true regarding the county highway engineer and other public officials so far as their compensation is concerned. To permit county road and bridge funds to be transferred to the general revenue fund of the county and then used to pay the salary of the different county officials would be an indirect method of evading the express provisions of the law. The compensation due a public official has to be paid as directed by statute and in no other manner.

CONCLUSION

It is the opinion of this office that county road and bridge funds cannot be transferred to the general revenue fund of the county and then used to pay the salary of the different county officials and employees for any services rendered by them.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being the most prominent part.

JOHN C. DANFORTH
Attorney General

Answer by letter-Gardner

May 13, 1970

OPINION LETTER NO. 261

Honorable Frank L. Mickelson
State Representative
District No. 110
State Capitol Building
Jefferson City, Missouri 65101



Dear Representative Mickelson:

This is in response to your request for information regarding the possibility of amending or in some manner changing the charter of the City of Pleasant Hill.

As pointed out in your letter, the City of Pleasant Hill is one of the few Missouri cities that operates under a special charter. Pleasant Hill was incorporated as a special charter city by legislative act approved March 14, 1859, Laws 1859, page 156 and amended by legislative act approved March 17, 1871. Laws 1871, page 168. The current Missouri Manual shows that the city now has a population of 2,689.

Certain fundamental principles of the law relating to municipal corporations are set forth in *State v. Crismon*, 188 S.W.2d 937 as follows:

" . . . 'The power to create or establish municipal corporations, or to enlarge or diminish their area, to reorganize their governments, or to dissolve or abolish them altogether is a political function which rests solely in the legislative branch of the government, and in the absence of constitutional restrictions, the power is practically unlimited.' 37 Am.Jur., Municipal Corporations, § 7, p. 626. In that connection this court has said: 'It has long been the rule in this state, and generally

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throughout the country, that the power of the legislature in the creation of public corporations * * * is absolute except where limited by the constitution. The legislature may also change, divide, consolidate and abolish them as the public welfare demands.' State ex rel. Consolidated School District No. 8 of Pemiscot County et al., v. Smith, State Auditor, 343 Mo. 288, 121 S.W.2d 160, 162, and cases therein cited."

The Constitution of Missouri places restrictions on the power of the legislature to change the charter of municipal corporations.

Article III, Section 40 of the Constitution provides:

"The general assembly shall not pass any local or special law:

* * * * *

"(22) incorporating cities, towns, or villages or changing their charters;"

Moreover, the Constitution of Missouri requires a classification of cities and that their power shall be defined by general law. Article VI, Section 15 of the Constitution provides:

"The general assembly shall provide by general laws, for the organization and classification of cities and towns. The number of such classes shall not exceed four; and the powers of each class shall be defined by general laws so that all such municipal corporations of the same class shall possess the same powers and be subject to the same restrictions. The general assembly shall also make provisions, by general law, whereby any city, town or village, existing by virtue of any special or local law, may elect to become subject to, and be governed by, the general laws relating to such corporations."

The General Assembly carried into effect the above provision of the Constitution and enacted Section 72.040, RSMo Supp. 1967, which reads as follows:

"All cities and towns in this state containing five hundred and less than three thousand inhabitants, and all towns existing under any

Honorable Frank L. Mickelson

special law, and having less than five hundred inhabitants which shall elect to be cities of the fourth class, shall be cities of the fourth class."

It seems evident without extended comment that the foregoing constitutional and statutory provisions not only prohibit an amendment of the legislative charter but also provide a method of transition from a municipality containing less than three thousand inhabitants and "existing under any special law" to a city of the fourth class.

The laws under which the City of Pleasant Hill was incorporated do not require the charter to be ratified every fifty years by a vote of the people. Your question whether the charter has any particular advantages or disadvantages is a question concerning which we are not in a position to advise you. It would be our suggestion that this question be submitted to the city attorney for consideration.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Answer by Letter (Nowotny)

October 5, 1970

OPINION LETTER NO. 262



Mr. Howard L. McFadden
General Counsel
Department of Corrections
Box 267
Jefferson City, Missouri 65101

Dear Mr. McFadden:

This letter is in response to your opinion request which asks if the State Department of Corrections is liable for hospital services provided to a prisoner for injuries incurred in an escape from the Oregon County Jail where he was being held in custody for escaping from an institution of the Missouri Department of Corrections.

We have examined the Missouri statutes and find no authority for the Department of Corrections to pay such a bill.

We are enclosing Opinion No. 31, dated January 26, 1965, to Hess and Opinion No. 16, dated October 12, 1938 to Chamier both of which deal with this subject.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosures:

Op. No. 31
1-26-65, Hess

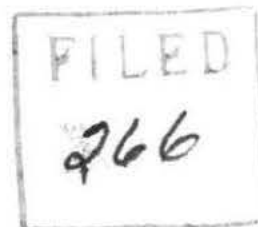
Op. No. 16
10-12-38, Chamier

Answer by Letter-Wieler

May 15, 1970

OPINION LETTER NO. 266

Mr. Harry Wiggins, Supervisor
Department of Liquor Control
Broadway State Office Building
Jefferson City, Missouri 65101



Dear Mr. Wiggins:

This is in response to your request for an opinion concerning that portion of Section 311.060, RSMo, which disqualifies for liquor license purposes any person who has been "... convicted, since ratification of the twenty-first amendment to the Constitution of the United States, of a violation of the provisions of any law applicable to the manufacture or sale of intoxicating liquor, or who employs in his business as such dealer, any person whose license has been revoked or who has been convicted of violating such law since the date aforesaid;"

With reference to this provision, you have asked the following questions:

- "1. If a person has been convicted of a felony under the National Prohibition Act, is he ineligible to hold a license or to be employed by a licensee under Section 311.060, Revised Statutes of Missouri, 1959?
- "2. If a person has been convicted of conspiracy to violate the Internal Revenue Laws, after repeal [sic, ratification] of the twenty-first amendment, for the sale or manufacture of intoxicating liquor, is he ineligible same under Section 311.060, Revised Statutes of Missouri, 1959?
- "3. Is a conviction for the possession of a still in violation of the Federal Internal

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Revenue Laws, said conviction coming after the ratification of the twenty-first amendment to the United States Constitution, a violation of the law applicable to the manufacture of alcoholic beverages as set forth in Section 311.060, Revised Statutes of Missouri, 1959?

"4. If a person has been convicted of a liquor law for the sale or manufacture of intoxicating liquor after the repeal of prohibition, or of any felony, and then is granted United States Citizenship, would this then remove the ineligibility for a license or for employment as provided in Section 311.060, Revised Statutes of Missouri, 1959?

"5. If a person has been convicted of a liquor law violation for the sale or manufacture of intoxicating liquor after repeal [sic, ratification] of the twenty-first amendment and is granted a full and unconditional pardon from the President of the United States, would this then remove his ineligibility for a license or for employment as set out in Section 311.060, Revised Statutes of Missouri, 1959?

"6. If a person has been convicted of a liquor law violation for the sale or manufacture of intoxicating liquor after repeal [sic, ratification] of the twenty-first amendment, and has served in the armed forces of the United States for not less than one year, and then been discharged under honorable conditions from active service, would the Proclamation of Harry S. Truman, then President of the United States, make the individual eligible to hold a liquor license or to be employed by a licensee?"

These questions will be considered in the order raised.

I

With respect to your first question, it is our opinion that a person who has been convicted of a felony under the National Prohibition Act is eligible to hold a liquor license in this state or be employed by a licensee unless such conviction disqualifies him from voting under the laws of this state, or unless the Supervisor

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of Liquor Control determines that the circumstances surrounding such conviction show bad moral character, providing this person is found to possess the other statutory qualifications. Enclosed are copies of Opinion No. 439, issued to you on October 30, 1969 and Opinion No. 13, issued to the Honorable C. M. Buford on February 5, 1954, which we feel adequately discuss this point. We note that a person convicted of a felony under the National Prohibition Act could not have been convicted subsequent to the ratification date of the Twenty-first Amendment, December 5, 1933, because the repeal of the Eighteenth Amendment on that date made further prosecution under the Act impossible. See U.S. v. Chambers, 291 U.S. 217, 78 L.Ed. 763 (1934).

II

One who is convicted of conspiracy to violate the Internal Revenue Laws dealing with the sale or manufacture of intoxicating liquor subsequent to the ratification of the Twenty-first Amendment is ineligible to hold a liquor license in this state or be employed by a licensee under Section 311.060. The statute provides that one who violates the provisions of any law applicable to the manufacture or sale of intoxicating liquor is ineligible to hold a liquor license. The Missouri Supreme Court has held that a conviction in a United States District Court for failure to pay an occupation tax as required by federal law for carrying on the business of a wholesale liquor dealer is sufficient to allow the Supervisor of Liquor Control to deny an applicant a liquor license. See *Wilson v. Burke*, 202 S.W.2d 876 (Mo. 1947). It is our view that a conviction of conspiracy to violate the Internal Revenue Laws which specifically deal with the sale or manufacture of intoxicating liquor also comes within the phrase "any law applicable to the manufacture or sale of intoxicating liquor."

III

It is our opinion that a conviction subsequent to the ratification of the Twenty-first Amendment for the possession of a still in violation of the Federal Internal Revenue Law is sufficient to render an applicant ineligible to hold a liquor license or be employed by a licensee under Section 311.060, RSMo. The term "still" denotes an apparatus used for the manufacture of intoxicating liquor and, therefore, conviction for possession of a still falls within the phrase "any law applicable to the manufacture or sale of intoxicating liquor."

IV

In answer to your fourth question, it is our opinion that a person who has been convicted of violating a liquor law dealing

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with the sale or manufacture of intoxicating liquor subsequent to the ratification of the Twenty-first Amendment is ineligible to hold a liquor license or be employed by a licensee under Section 311.060, RSMo, even though he was granted United States citizenship subsequent to his conviction. Section 311.060 specifically forbids the granting of a liquor license to one who has been convicted of any law applicable to the sale or manufacture of intoxicating liquor subsequent to the ratification of the Twenty-first Amendment. The granting of United States citizenship does not expunge the record of conviction. With respect to one who has been convicted of a felony unrelated to the liquor law and then granted citizenship, it is our opinion that such person is ineligible to hold a liquor license if such conviction disqualifies him from voting under the laws of this state. A naturalized citizen is made a citizen of the United States under an act of Congress, but the act does not give, regulate or prescribe his capacities. A naturalized citizen gains no priorities but stands on the same footing as a native citizen. See *Osborn et al. v. The Bank of the United States*, 22 U.S. (9 Wheat.) 738, 827, 6 L.Ed. 204, 225 (1824).

V

A person convicted of a liquor law violation involving the sale or manufacture of intoxicating liquor subsequent to the ratification of the Twenty-first Amendment is ineligible to hold a liquor license or be employed by a licensee under Section 311.060 even though he has been granted a full and unconditional pardon from the President of the United States. Enclosed is a copy of Opinion No. 13, issued to the Honorable Edmund Burke on May 16, 1946, which adequately explains this point.

VI

The proclamation of the President of the United States concerning an individual who has served in the armed forces of the United States for not less than one year and then been discharged under honorable conditions would not make that individual eligible to hold a liquor license or be employed by a licensee where he has been convicted of a liquor law violation involving the sale or manufacture of intoxicating liquor subsequent to the ratification of the Twenty-first Amendment. A proclamation by the President has no greater force and effect than a full Presidential pardon would have. It does not expunge the record of conviction. Therefore, the reasoning of Opinion No. 13, as used above, is applicable to this situation.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 439, 10-30-69, Wiggins
Op. No. 13, 2-5-54, Buford
Op. No. 13, 5-16-46, Burke

MUNICIPAL HOUSING AUTHORITY:
LAND CLEARANCE FOR REDEVELOPMENT AUTHORITY:
INTEREST:

Municipal housing
authorities and
land clearance for
redevelopment au-
thorities are

authorized to agree to pay the "going federal rate of interest" on contracts entered into with the federal government for planning advances and contributions.

OPINION NO. 271

May 8, 1970

Mr. Gene Sally, Director
Department of Community Affairs
Jefferson State Office Building
Jefferson City, Missouri 65101



Dear Mr. Sally:

This is in response to your request for an opinion concerning the power of housing authorities and land clearance for redevelopment authorities to agree to pay the "going federal rate of interest" on advancements of money by the federal government. Specifically, you asked:

"Do housing and land clearance for redevelopment authorities have the power to agree to pay the "going Federal rate of interest" on annual contribution contracts, planning advances, loans, grants or contributions?"

You state that these various forms of financial assistance from the federal government to the local authorities are to bear interest at a rate of six and three-eighths percent, which is the current "going federal rate of interest."

The powers and duties of a housing authority in Missouri are governed by the provisions of Sections 99.010 through 99.230, RSMo, as amended. Section 99.140, RSMo 1959 provides that an authority shall have power to issue bonds from time to time in its discretion for any of its corporate purposes. The term "bonds" is defined in Section 99.020, RSMo 1967 Supp. as:

"The following terms, wherever used or referred to in sections 99.010 to 99.230 shall have the following respective meanings unless a different meaning clearly appears from the context:

Mr. Gene Sally

* * *

"(14) 'Bonds' shall mean any bonds, notes, interim certificates, debentures, or other obligations issued by the authority pursuant to this chapter;"

Section 99.150, RSMo 1959, provides that the bonds of an authority shall be authorized by resolution and shall bear interest at such rate or rates as such resolution, its trust indenture or mortgage may provide, not to exceed six percent per annum. In Opinion Letter No. 512, issued to you on December 19, 1969 (copy enclosed), it was our opinion that Section 99.150 had been amended by the provisions of House Bill No. 2 of the first extraordinary session of the Seventy-Fifth General Assembly to the extent that bonds issued by said authority may be sold at not less than ninety-five percent of par and may bear interest at a rate between six and eight percent if sold at public sale. However, in Opinion Letter No. 162 issued to you on February 9, 1970 (copy enclosed), it was our opinion that Section 99.150, as amended by House Bill No. 2, would not permit a municipal housing authority to sell bonds to the federal government at private sale at a rate in excess of six percent but less than eight percent. Although we were aware that Section 99.210, RSMo 1959 generally provides that a municipal authority may do any and all things necessary or desirable to secure the financial aid or cooperation of the federal government in the undertaking, construction, maintenance or operation of any housing project by such authority, it was our feeling that this section did not supersede or take precedence over Section 99.150, which specifically deals with the bonds of a municipal housing authority and the interest rates thereon.

Therefore, a housing authority can enter into contribution contracts, planning advances and other arrangements with the federal government pursuant to the statutory authority of Section 99.210, such contracts providing for payment of interest in excess of six percent per annum, only where the obligation to pay is not evidenced by an instrument which is a "bond" within the statutory definition. It is our opinion that the term "bond" as defined in Section 99.020(14) contemplates the sort of instrument that is generally thought of as a "bond", i.e., a bond or debenture or promissory note in which a promise is made to pay, at a specified date or dates, to the bearer, providing for fixed payments of principal and interest at stated times, and in a form which is transferable or assignable, whether negotiable or not. We note the language in Section 99.150(1), which provides:

"Bonds of an authority shall be authorized by its resolution and may be issued in one or more series and shall

Mr. Gene Sally

bear such date or dates, mature at such time or times, bear interest at such rate or rates, not exceeding six per cent per annum, be in such denomination or denominations, be in such form, either coupon or registered, carry such conversion or registration privileges, have such rank or priority, be executed in such manner, be payable in such medium of payment, at such place or places, and be subject to such terms of redemption (with or without premium) as such resolution, its trust indenture or mortgage may provide."

It seems clear that Section 99.150(1), as amended, only applies to those bonds which are "bonds" in the traditional sense. Since the various types of financial arrangements between the local authorities and the federal government mentioned in your letter do not meet this definition, it is our opinion that the local authorities can enter into such arrangements and agree to pay the "going federal rate of interest."

Much the same reasoning applies with respect to land clearance for redevelopment authorities, which are governed by Sections 99.300 through 99.660, RSMo, as amended. Section 99.490, RSMo 1959, as amended by House Bill No. 2 (see Opinion Letter No. 162), provides that a land clearance for redevelopment authority may issue bonds by resolution at an interest rate up to eight percent, if sold at public sale; with the further provision that the bonds may be sold at private sale at an interest rate not in excess of six percent.

Generally, Section 99.320, RSMo 1967 Supp. provides:

"As used in this law, the following terms mean:

* * *

"(4) 'Bond', any bonds, including re-funding bonds, notes, interim certificates, debentures, or other obligations issued by an authority pursuant to this law;"

Section 99.420, RSMo 1959, applicable to Land Clearance for Redevelopment authorities, provides in part:

Mr. Gene Sally

"An authority shall constitute a public body corporate and politic, exercising public and essential governmental functions, and having all the powers necessary or convenient to carry out and effectuate the purposes and provisions of this law, including the following powers in addition to others herein granted:

* * *

"(8) To borrow money and to apply for and accept advances, loans, grants, contributions and any other form of financial assistance from the federal government, the state, county, municipality or other public body or from any sources public or private, for the purposes of this law, to give such security as may be required and to enter into and carry out contracts in connection therewith; an authority, notwithstanding the provisions of any other law, may include in any contract for financial assistance with the federal government for a land clearance or urban renewal project such conditions imposed pursuant to federal law as the authority may deem reasonable and appropriate and which are not inconsistent with the purposes of this law;"

Therefore, a land clearance for redevelopment authority would not be entitled to enter into contribution contracts, planning advances, or other arrangements with the federal government pursuant to Section 99.420(8), such contracts providing for payment of interest in excess of six percent per annum, if the obligation to pay is evidenced by an instrument which is a "bond" within the statutory definition. We believe that the term "bond", as defined in Section 99.320(4), contemplates the same type of instrument as that described previously with respect to municipal housing authorities. We note the language of Section 99.490(1) which provides:

"Bonds of an authority shall be authorized by its resolution and may be issued in one or more series and shall bear such date or dates, be payable upon demand or mature at such time or times, bear interest at such rate or rates, not exceeding six per cent per

Mr. Gene Sally

annum, be in such denomination or denominations, be in such form either coupon or registered, carry such conversion or registration privileges, have such rank or priority, be executed in such manner, be payable in such medium of payment, at such place or places, and be subject to such terms of redemption (with or without premium) as such resolution, its trust indenture or mortgage may provide."

The types of financial arrangements between the local land clearance for redevelopment authorities and the federal government mentioned in your letter do not meet the definition of a "bond", as set out in Section 99.320(4), and, therefore, it is our opinion that land clearance for redevelopment authorities can enter into arrangements of this type with the federal government and agree to pay interest at the going federal rate.

CONCLUSION

It is the opinion of this office that municipal housing authorities and land clearance for redevelopment authorities are authorized to agree to pay the "going federal rate of interest" on contracts entered into with the federal government for planning advances and contributions.

This opinion, which I hereby approve, was prepared by my Assistant, Richard Wieler.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosures:

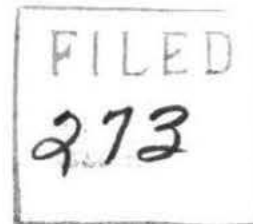
Opinion Letter No. 162, Sally, 2-9-70
Opinion Letter No. 512, Sally, 12-19-69

(Answer by Letter) C. B. Blackmar

April 23, 1970

OPINION LETTER NO. 273

Honorable Joe D. Holt
State Representative
District 102
829 Center Avenue
Fulton, Missouri 65251



Dear Representative Holt:

This letter is issued in response to your request of March 30, 1970, in which you ask the opinion of this office about certain questions relating to the organization and bonded indebtedness of fire protection districts in counties of the third class, under Chapter 321, RSMo, as amended by House Bill No. 322, Seventy-Fifth General Assembly, in 1969.

Organization

By reason of House Bill No. 322, Seventy-Fifth General Assembly, we now have a uniform procedure for the establishment of fire protection districts in all counties of the state. This was accomplished by amending Section 321.020, RSMo, so that it would apply to all counties, and by repealing the provisions relating specially to counties of the second, third and fourth class.

The effect of these amendments is to make Sections 321.030 through 321.070, RSMo 1959, applicable to all counties. They formerly applied only to counties of class one. These sections describe the detailed procedure for the formation of fire protection districts. We attach copies of these sections for your convenience.

The sections specify a procedure which is, summarily, as follows;

Honorable Joe D. Holt

(a) A petition must be signed by at least one hundred taxpaying electors of the proposed district (Section 321.030);

(b) The detailed contents of the petition are specified in Section 321.040;

(c) Notice is given by publication, specifying a hearing date not less than thirty days nor more than sixty days following the filing of the petition (Section 321.070);

(d) One or more taxpaying electors may file a protest petition, any time before the hearing date (Section 321.090).

Issuance of Bonds

Bonds of fire protection districts are governed by Section 26 of Article VI of the Missouri Constitution, and by Sections 321.340 through 321.380 of the Missouri Revised Statutes. Sections 321.340 and 321.380 are in the same form now that they were in 1959. The intervening sections were amended by House Bill No. 322, Seventy-Fifth General Assembly, in 1969.

The limitation on amount of bonded indebtedness is found in Section 26(b) of Article VI of the Missouri Constitution, and amounts to five percent of the taxable tangible property in the district as shown by the last completed assessment for state and county tax purposes.

Bonds may be authorized by two-thirds vote of those casting ballots at a general or special election. The board of directors of the district may authorize the placing of a bond proposal on the ballot, by resolution. See Section 321.350, RSMo, House Bill No. 322, Seventy-Fifth General Assembly (1969); Section 321.380, RSMo 1959; Missouri Constitution, Article VI, Section 26(b).

The authority of a district in a third class county to levy taxes is found in Section 321.240, House Bill No. 322, Seventy-Fifth General Assembly, and in Section 321.260, RSMo 1959. The effect of the 1969 amendments is to make both of these sections applicable to fire protection districts established in third class counties. Section 321.240 provides for the basic levy and specifies that "...in addition thereto,..." the board may "...fix a rate of levy which will enable it to promptly pay in full when due all interest on and principal of bonds..." By reason of Section 26(f) of Article VI of the Missouri Constitution, bonded indebtedness may not be incurred until the issuing authority has made provision for an annual levy sufficient to discharge the principal and interest of the bonds within twenty

Honorable Joe D. Holt

years. Under Section 321.260, RSMo 1959, a fire protection district may levy such additional taxes as are necessary to prevent default on bonded indebtedness.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosures

CONSTITUTIONAL LAW:
PHYSICIANS & SURGEONS:

The provision of Section 334.031 RSMo 1959 which requires that candidates for licenses as physicians and surgeons in the State of Missouri shall be citizens of the United States is unconstitutional.

OPINION NO. 276

May 22, 1970

Honorable Thomas D. Graham
State Representative
312 East Capitol Avenue
Jefferson City, Missouri 65101



Dear Representative Graham:

This opinion is in response to your question concerning whether the citizenship requirement of Section 334.031, RSMo 1959, is discriminatory and unconstitutional.

Section 334.031 provides in part:

"1. Candidates for licenses as physicians and surgeons shall be citizens of the United States and shall furnish satisfactory evidence of their good moral character, and their preliminary qualifications, to wit: . . ."

Thereafter, the section sets forth in detail the educational prerequisites necessary to qualify as a candidate. Thus, a candidate is required to establish his graduation from an accredited high school or its equivalent and satisfactory evidence of completion of pre-professional education consisting of at least 60 semester hours. He must provide satisfactory evidence that he attended and received a diploma throughout at least four terms of 32 weeks of actual instruction in each term and received a diploma from a reputable medical college or osteopathic college that enforces certain other requirements that are provided for in Section 334.031.

Section 334.040 provides that all persons desiring to practice as physicians and surgeons in Missouri must present themselves to be examined as to their fitness. The type of examination, certain subjects which must be included, average grade levels which must be obtained by each candidate and the administration of the examination is set forth.

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Section 334.031 and 334.040 provide, therefore, a comprehensive qualification and testing procedure through which a person obtains a license to practice medicine in the State of Missouri.

In addition to the foregoing, applicants may be admitted to the practice of medicine under Section 334.043 RSMo 1959 in Missouri without examination where the applicant is "legally qualified" and he has met the educational requirements of this state and holds a certificate in any state or territory of the United States or of the District of Columbia authorizing the practice of medicine. The State Board of Registration for the Healing Arts (Board) does not license an alien licensed in another state and otherwise qualified educationally on the grounds that such a person is not "legally qualified" under Section 334.031.

Section 334.045 allows the Board to issue a temporary license to an otherwise qualified physician to practice in state maintained hospitals or other hospitals approved by the Board even though such a person is not a citizen of the United States where the applicant is legally authorized to practice under the laws of another state, territory or foreign country and who has met such other requirements as the Board may impose. The temporary license shall limit the licensee to practice in the designated hospital under the supervision of the Chief of Staff of the hospital and no fees for services shall be charged by the licensee or the hospital for services performed by the licensee.

The citizenship requirements were not contained in the previous laws with respect to practitioners of medicine, surgery and midwifery. Chapter 334 RSMo 1949.

The opinion request requires an interpretation of that portion of the Fourteenth Amendment to the Constitution of the United States which provides:

"[N]or shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

The protection afforded by the above quoted portion of the Fourteenth Amendment extends to both citizens and aliens. In Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1885), the court referred to the above language from the Fourteenth Amendment and stated:

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"These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws." loc. cit. 118 U.S. 356, 369.

The plaintiff in this case was a citizen of China and he was attacking an ordinance which in its application was being used to deprive Chinese citizens from operating laundries. Aliens, therefore, enjoy the same right to equal protections enjoyed by citizens.

The requirement that an applicant be a citizen imposed by Section 334.031 is, of course, discriminatory in the sense that all persons other than citizens who have the requisite educational qualifications are qualified applicants. The question, however, is whether the class created is permissible under the Fourteenth Amendment.

In regulating its affairs, each state has through its police power considerable discretion in regulating the affairs of the state and, in the process, to create classifications. The basic requirement in this classification process is that the classes bear some relation to the purpose for which the class was created. In Petitt v. Field, 341 S.W.2d 106, 109 (Mo.S.Ct., 1960) the court stated:

" . . . it is arbitrary discrimination violating the Equal Protection Clause of the 14th Amendment to make exclusions not based on differences reasonably related to the purposes of the Act. . . ."

It is necessary, therefore, to undertake to determine the purpose served by licensing physicians. This purpose has been discussed on numerous occasions. In State v. Hathaway, 21 S.W. 1081, 1083 (Mo.S.Ct., 1893) the court in referring to the creation of the Board of Health which then licensed physicians stated:

" . . . This statute is the exercise by the legislature of its prerogative to pass all needful laws for the preservation of the health of the people of this commonwealth. Its right to regulate the practice of those trades and professions requiring professional skill and learning can no longer be doubted. . . ."

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* * *

"The legislature, then, in the interest of society, and to prevent the imposition of quacks, adventurers, and charlatans upon the ignorant and credulous, has the power to prescribe the qualifications of those whom the state permits to practice medicine. . . ." loc. cit. 21 S.W. 1081, 1083.

In State v. Davis, 92 S.W. 484, 488 (Mo.S.Ct., 1906) the court in referring to the state statute governing the licensing of physicians stated:

". . . The prime object of this law upon the subject of the practice of medicine is the protection of the people from the impositions herein indicated by persons who are not sufficiently skilled in the profession to authorize them to properly administer medicine and therefore relieve the afflicted. . . ." loc. cit. 92 S.W. 484, 488.

Finally, in State v. Scopel, 316 S.W.2d 515, 518 (Mo.S.Ct., 1958) the court stated:

"It is clear that, for protection of the public health and welfare, the legislature is empowered to regulate the practice of medicine in such manner as it reasonably may believe to be proper and wise. . . ." loc. cit. 316 S.W. 515, 518.

The purpose to be served by requiring that an applicant be a citizen must, therefore, relate to and further the protection of the public health from persons who are unqualified and who because of their willingness to represent themselves as physicians might injure the public who are unable to ascertain their true qualifications.

We have been unable to locate any case which has considered the requirement of citizenship to the practice of medicine. In Templar v. Michigan State Board of Examiners of Barbers, 90 N.W. 1058, 1059-1060 (Mich.S.Ct., 1902) the court determined that a requirement that a barbers license be restricted to citizens was unconstitutional as a violation of the Fourteenth Amendment. In its discussion, the court discussed a prior Michigan case which had held that no person has a vested right to practice medicine. The court stated:

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" . . . We do not hesitate to reiterate that doctrine. We think it must be considered as settled that in the protection of the public health the legislature has the right to provide for an examination of all persons who seek to engage in the practice of medicine, and to have their qualifications passed upon by a properly constituted board. But the practice of medicine is no more an incident of citizenship than the practice of a trade of a barber. All persons are entitled to enjoy the equal protection of the law, . . ."

The court also indicated that if the legislature has the power to require citizenship, might the legislature not have the power to exclude alien labor wholly? The court answered in the negative.

Citizenship has been upheld as a prerequisite for the right to practice certain vocations or businesses on a number of occasions.

These cases are collected in 39 A.L.R. 346-351. It has been held that a state may deny to aliens the right to act as an auctioneer, Wright v. May, 149 N.W. 9 (Minn.S.Ct., 1914); to sell liquor, Trageser v. Gray, 20 A. 905 (Md.Ct.App., 1890); to obtain a peddlers license, Commissioner v. Hanna, 81 N.E. 149 (Mass.Sup.Jud.Ct., 1907). These cases were rationalized in George v. City of Portland, 235 P. 681 (Ore.S.Ct., 1925) on the grounds that these particular occupations have been historically subject to abuse and that the "occupations involved have been practically placed under the ban of the law and in the domain of privilege only, so that, strictly speaking, no right belongs to anyone to engage in such occupation."

A similar rationale seems to underly Ohio ex rel. Clarke v. Deckevach, 274 U.S. 392, 71 L.Ed. 1115 (1926) where the court upheld as consistent with the Fourteenth Amendment a Cincinnati, Ohio, ordinance which prohibited an alien from obtaining a license to conduct a billiard and pool room. The court noted that in a prior case the court had taken judicial notice of the "harmful and vicious tendency of such establishments." The court held that the ordinance does not preclude the possibility of a rational basis for the legislative judgment and that it had not knowledge of the local conditions sufficient to say that the legislature was clearly wrong.

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Where the court found no relationship between a particular occupation and a prohibition against the employment of aliens, the classification has been struck down. In Truax v. Raich, 239 U.S. 33, 60 L.Ed. 131 (1915) the court had before it an Arizona statutory provision which required every employer of more than five persons to employ not less than 80% qualified electors or native born citizens of the United States. The state asserted that the act was justified as an exercise of the state to make reasonable classifications in promoting health, safety, morals and welfare of those within its jurisdiction. The court held that the broad range of legislative discretion "does not go so far as to make it possible for the State to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood." The court went on to say:

" . . . It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure. . . ." loc. cit. 239 U.S. 33, 41.

In Takahashi v. Fish and Game Commission, 334 U.S. 410, 92 L.Ed. 1478 (1947) the court struck down a California statute which provided that a commercial fishing license could not be granted to a person "ineligible to citizenship". Under the federal naturalization laws a citizen of Japan was not then eligible to become a citizen. California urged that it had a public interest in the fish on its coastline and that it could regulate commercial fishing to assure to its citizens the use of these fish. The court held that whatever ownership the state might have in these fish, it is inadequate to justify the exclusion of all aliens who are lawful residents of the state from making a living by fishing while permitting all others to do so.

There are a number of other cases which have discussed the basic question of the appropriate limitations that a state may impose upon aliens in their choice of occupations. The above is thought to be representative.

The Attorney General of Texas in an opinion to Honorable M. H. Crabb, December 7, 1950, held that the State of Texas could not constitutionally limit medical licenses to United States citizens. In that opinion, the Attorney General quoted extensively from Wormsen v. Moss, 20 N.Y.S.2d 798, 803 (1941).

Honorable Thomas D. Graham

The court there considered the constitutionality of a citizenship requirement for a massage operator. The court stated:

" . . . Thus the alien, like the citizen, has the right to engage in a lawful occupation. If the calling is one that the State, in the exercise of its police power, may prohibit either absolutely or conditionally, by the exaction of a license, the fact of alienage may justify a denial of the privilege. But even then, there must be some relation between the exclusion of the alien and the protection of the public welfare. (Citation omitted.) Classification as between citizens and aliens is permissible, but the classification must have some reasonable basis in the welfare of the community. . . ."

Is there, then, a rational basis for excluding aliens from the practice of medicine in Missouri?

In our opinion, the requirement of citizenship does not further the purpose of providing to the public skillful and well-trained doctors. An alien as well as a citizen must satisfy the Board that he has undergone extensive specialized training. This training is then put to the test of an examination which the candidate must satisfactorily pass. Further, under Section 343.043, a citizen who has obtained a license in a sister state may be admitted without undergoing the testing procedures. Presumably, this reciprocity is based upon the fact that every state protects its residents, as does Missouri, by requiring rigorous tests before such a license can be obtained. A citizen who has a license from another state is presumed to be qualified when he enters Missouri. A non-citizen does not enjoy that presumption and is not permitted to demonstrate his skill by submitting to the testing procedures.

Chapter 334 was amended in 1963 by the addition of Section 334.045 through which an alien is permitted to obtain a temporary license to practice as a physician and surgeon in designated hospitals under the supervision of the Chief of Staff if the alien is legally authorized to practice under the laws of a state, territory or a foreign country, and who meets other requirements the Board may prescribe. The interplay of Sections 334.031 and 334.045 thus allows an alien to practice medicine albeit under supervision, but does not permit the alien to be examined to be determined if his skill is such as to permit him to practice. Thus, the prohibition restricts the power of the Board to actually determine if a physician licensed in a foreign country can meet the standards set in Sections 343.031 and 343.040.

Honorable Thomas D. Graham

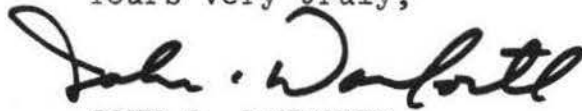
Under these circumstances, we can discern no relationship between the status of citizenship and the qualification of a person to be a candidate for a license to practice medicine.

CONCLUSION

It is therefore, the opinion of this office that the provision of Section 334.031 RSMo 1959 which requires that candidates for licenses as physicians and surgeons in the State of Missouri shall be citizens of the United States is unconstitutional.

The foregoing opinion, which I hereby approve, was prepared by my assistant John C. Craft.

Yours very truly,

A handwritten signature in cursive script, reading "John C. Danforth".

JOHN C. DANFORTH
Attorney General

(Answer by Letter) Klaffenbach

April 16, 1970

OPINION LETTER NO. 277

Honorable James S. Stubbs
Prosecuting Attorney
Livingston County Court House
Chillicothe, Missouri 64601



Dear Mr. Stubbs:

This letter is in response to your opinion request concerning an inhabitant of Livingston County who was charged with a felony in Livingston County, obtained a change of venue to Carroll County, and thereafter, while in the Carroll County jail, became sick and required hospitalization and surgery which was performed in a hospital at Carrollton, Missouri. Specifically, you question whether the county court of Livingston County has the authority to pay for the hospitalization and medical treatment of the prisoner. You also advised that you consider this person a poor person.

In previous correspondence to you, we sent you the following opinions: i.e.

Opinion No. 133, Blanck, 5-2-68
Opinion No. 31, Hess, 1-26-65
Opinion No. 35, Gullie, 10-26-49
Opinion No. 16, Chamier, 10-12-38
Opinion No. 3, Smith, 2-28-33

We are also enclosing our Opinion No. 8, 1-13-70, to Becker, relative to the same question.

For the reasons stated in these opinions, it is our view that the County Court of Livingston County does have the authority to

Honorable James S. Stubbs

pay medical and hospital bills of one of its inhabitants, within the meaning of Section 205.600, who is deemed by the court to be a "poor" person even though such person is given such medical treatment and hospitalization outside the boundaries of Livingston County.

Very truly yours,

JOHN C. DANFORTH
Attorney General

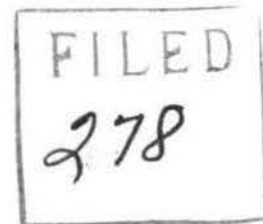
Enclosure: Op. No. 8, 1-13-70, Becker

Answer by letter-Wood

April 27, 1970

OPINION LETTER NO. 278

Mr. Joseph Jaeger, Jr.
Chairman
State Inter-Agency Council
for Outdoor Recreation
P. O. Box 564
Jefferson City, Missouri 65101



Dear Mr. Jaeger:

This is in response to your letter of March 31, 1970, requesting my opinion as to:

The authority of the State of Missouri to participate in the Land and Water Conservation Fund program, pursuant to the Land and Water Conservation Fund Act of 1965, Public Law 88-578, 16 USCA §460 1-4, 5, 6, 7, 8, and

(2) The designated agency and its authority to represent and act for the State of Missouri in preparing and maintaining the Missouri Comprehensive Statewide Outdoor Recreation Plan submitted to the Secretary of the Interior pursuant to the above Act.

The Constitution of Missouri, 1945 contains no limitations on the power of the General Assembly to enter into agreements with the United States that govern the use of federal funds granted to this state. The General Assembly is specifically authorized by the Constitution to receive money or property from the United States and redistribute the same together with public money of this state for any public purpose designated by the United States (Article III, Section 38(a), Constitution of Missouri, 1945).

Mr. Joseph Jaeger, Jr.

The General Assembly has created in the State Treasury a fund known as The Inter-Agency Council Fund. All federal funds granted to this state pursuant to the Land and Water Conservation Fund Act of 1965 are to be deposited in the Inter-Agency Council Fund for subsequent appropriation and exclusive use in outdoor recreation planning, acquisition, and development (Section 258.080 (1) (2), RSMo 1967 Cum. Supp.). Accordingly, it is my opinion that the State of Missouri is authorized to participate in the Land and Water Conservation Fund Program.

The General Assembly has established the State Inter-Agency Council for Outdoor Recreation whose duties are to serve as:

"(1) The official state agency for liaison with the federal bureau of outdoor recreation;

"(2) The official state agency to receive and disburse federal funds available to this state for overall outdoor recreation;

"(3) The official state agency to receive and allocate to the appropriate agency, or political subdivision, federal funds available for outdoor recreation programs; . . ." (Section 258.060 (1), (2), (3), RSMo 1967 Cum. Supp.

All funds appropriated from The Inter-Agency Council Fund are to be received and expended or allocated by the State Inter-Agency Council for Outdoor Recreation, at least fifty percent of which funds must be allocated to political subdivisions of the State of Missouri, and none of which funds may ever revert to the general revenue funds of the State of Missouri. (Section 258.080 (2), (3), RSMo 1967 Cum. Supp.).

Accordingly, it is my opinion that the State Inter-Agency Council for Outdoor Recreation is the designated agency and has full authority to represent and act for the State of Missouri in preparing and maintaining Missouri's Comprehensive Statewide Outdoor Recreation Plan.

Yours very truly,

JOHN C. DANFORTH
Attorney General

INTEREST:
STATE TREASURER:

In computing interest with respect to time deposits of state moneys, the State Treasurer should apply with respect to deposits held by the bank

for any calendar quarter or portion of a calendar quarter, the formula rate which is applicable for the quarter in which those deposits are held. The applicable formula rate is the rate computed as set forth in the statute which is compiled from data available in the quarter prior to the quarter in which the deposits are held and which formula rate is computed within the quarter in which the deposits are held. If the maximum rate permitted by federal law is less than the formula rate then that figure must necessarily be used.

OPINION NO. 279

June 19, 1970

Honorable William E. Robinson
State Treasurer of Missouri
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Robinson:

You have recently requested that we advise you with regard to the correct procedure in computing interest in conformity with Section 30.265 which was enacted in 1969.

Section 30.265 (3) and (4) provide:

"3. Promptly following the close of each calendar quarter the state treasurer, after consulting one or more sources he deems to be reliable, shall determine the average rate of accepted competitive bids for thirteen week United States of America treasury bills issued during the calendar quarter last closed and the rate so determined from calendar quarter to calendar quarter minus one-half of one percent, adjusted by the state treasurer to the closest one-tenth of a percent, shall be the formula rate for the calendar quarter in which such determination is made.

Honorable William E. Robinson

"4. The rate of interest payable by banking institutions on time deposits of state moneys for any calendar quarter or portion thereof during which the particular depository holds a particular time deposit of state moneys shall be the lesser of:

"(1) The formula rate applicable to the particular calendar quarter, or

"(2) The maximum rate of interest which by federal law or regulation a bank which is a member of the federal reserve system may lawfully contract to pay on the particular account in which the time deposit is made at the time such account is opened."

In your opinion request, the question that is presented is stated as follows:

"At the present time, the regulation to which reference is made provides a rate of 6.75%. We should appreciate having your advice as to the correct procedure in our computation of interest. For instance, should we use the average for the previous calendar quarter to figure the interest on maturities until the end of the next calendar quarter and figure the interest at the maturity of a 90-day period and not on a calendar quarter basis?"

Section 30.265 (2) further requires that contracts with respect to time deposits of state money shall require that the deposits may be withdrawn by the State Treasurer not less than 90 days after the date of deposit or 90 days after the last preceding date on which the deposit might have been withdrawn. It seems apparent, therefore, that the legislature contemplated that the contracts through which state moneys are to be deposited in banking institutions are to specify a term of 90 days and that the funds are to be available to the Treasurer at 90 day intervals.

In Section 30.265 (4) (2) the legislature recognized that under federal law a maximum rate of interest which may be paid by banks is imposed and, of course, the legislature cannot require that the contracts yield a higher rate of return than is permitted.

Honorable William E. Robinson

Your question relates to the method of computing the formula rates which, if it is lower than the maximum rate, is the rate which the Treasurer is to receive under his contracts for the deposit of state money.

The method of computing the "formula rate" is set forth in Section 30.265 (3). The yield is to be determined promptly following the close of each calendar quarter and is to consist of the average rate of accepted competitive bids for thirteen-week United States of America treasury bills issued during the calendar quarter last closed. That is, at the conclusion of, say, the first calendar quarter, the Treasurer is to determine the average rate of the described treasury bills that were issued during the first quarter. The rate determined in this fashion minus one-half of one percent is described as the formula rate.

It is apparent that the legislature contemplated that the Treasurer is to re-determine the formula rate at the conclusion of each calendar quarter. Section 30.265 (3) provides that the Treasurer shall "promptly following the close of each calendar quarter" determine the rate as described above and, furthermore, the legislature described the rate as "so determined from calendar quarter to calendar quarter." Thus, the Treasurer by applying the statutory procedure will arrive at a "formula rate" at the conclusion of each calendar quarter. The final question is to what time period does the formula rate apply.

The concluding clause of Section 30.265 (3) provides:

" . . . (The rate) shall be the formula rate for the calendar quarter in which such determination is made."

At the conclusion of each quarter, the Treasurer is to determine the formula rate. The formula rate, derived from each quarter must of necessity be computed during the next quarter and is the formula rate applicable under Section 30.265 (4) for moneys in the calendar quarter or portion thereof "during which the particular depository holds a particular time deposit. . . ."

Thus, where moneys are deposited for a time period which will include a portion of the second quarter and a portion of the third quarter, the rates determined in the second quarter (from data derived from the first quarter) will govern for the deposit in the bank in the second quarter and the rate determined in the third quarter (from data compiled in the second quarter) will govern for the time that the moneys were held in the bank in the

Honorable William E. Robinson

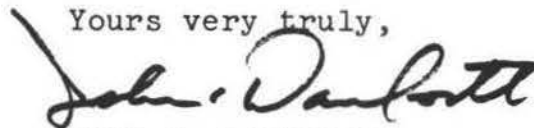
third quarter. Where the 90 day deposit period encompasses more than one quarter, the Treasurer must apply two formula rates and the amount of interest to be received for the 90 day period will be computed by applying the applicable rates to the number of days falling within the quarter to which that rate applies.

CONCLUSION

It is, therefore, the opinion of this office that in computing interest with respect to time deposits of state moneys, the State Treasurer should apply with respect to deposits held by the bank for any calendar quarter or portion of a calendar quarter, the formula rate which is applicable for the quarter in which those deposits are held. The applicable formula rate is the rate computed as set forth in the statute which is compiled from data available in the quarter prior to the quarter in which the deposits are held and which formula rate is computed within the quarter in which the deposits are held. If the maximum rate permitted by federal law is less than the formula rate then that figure must necessarily be used.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Craft.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Answer by letter-Wood

May 6, 1970

OPINION LETTER NO. 280

Mr. Joseph Jaeger, Jr.
Director of Parks
Missouri State Park Board
1204 Jefferson Building
P. O. Box 176
Jefferson City, Missouri 65101



Dear Mr. Jaeger:

You have inquired as to the legality of searches without warrants by agents of the Conservation Commission of rented cabins at State Parks.

A specific statute defines the powers of search of these agents:

"[Any authorized agent of the conservation commission] may search, without warrant, any creel, container, gamebag, hunting coat, or boat in which he has reason to believe wild life is unlawfully possessed or concealed; and at any and all times may seize any wild life in the possession or control of any person violating or who there is good reason to believe has violated this law or any of the rules or regulations of the commission; provided, however, that he shall first obtain a search warrant to enter and search an occupied dwelling and outbuildings immediately adjacent thereto, cold storage locker plant, motor vehicle, or sealed freight or express car for such purposes and then only in the daytime, and in the

Mr. Joseph Jaeger, Jr.

search of a cold storage locker plant every precaution shall be exercised to prevent contamination of foods stored therein. Any judge, or magistrate having jurisdiction, shall issue to such agent, sheriff, or marshal, a search warrant upon his complaint being made on oath in writing that the affiant has reasonable and probable cause to believe that wild life is possessed or concealed in such occupied dwellings and outbuildings immediately adjacent thereto, cold storage locker plant, motor vehicle, or sealed freight or express car contrary to this law or to any such rules and regulations." (Section 252.100(2), RSMo 1959)

This statute must be viewed in the light of Federal (Kaufman v. U.S., 394 U.S. 217, 22 L.Ed.2d 227 (1969) and State constitutional standards relating to searches and seizures, for the United States Supreme Court has ruled that these standards apply to administrative inspections pursuant to police power statutes or ordinances. In Camara v. San Francisco Municipal Court, 387 U.S. 523 18 L.Ed 2d 930 (1967), the Court declared that a city housing code authorizing city health inspectors to enter apartment residences without a search warrant was an unconstitutional search, and in See v. City of Seattle, 387 U.S. 541, 18 L.Ed.2d 943 (1967), the same declaration was made as to a municipal fire code permitting inspectors to enter a commercial warehouse without a search warrant. We believe that Missouri's Conservation Law must be likewise judged by constitutional search and seizure standards, and of course, construed in harmony with the same.

The Federal Constitution preserves "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," (Fourth Amendment) and the State Constitution preserves the right of the people to ". . . be secure in their persons, papers, homes and effects, from unreasonable searches and seizures;" (Article I, Section 15).

These constitutional protections extend beyond a person's home, house, or dwelling taken in their strict sense.

". . . What the Fourth Amendment protects is the security a man relies upon when he places himself or his property within a constitutionally protected area, be

Mr. Joseph Jaeger, Jr.

it his home or his office, his hotel room or his automobile. There he is protected from unwarranted governmental intrusion So it was that the Fourth Amendment could not tolerate the warrantless search of the hotel room in Jeffers, [342 U.S. 48]. . . ." (Hoffa v. U.S., 385 U.S. 293, 301 17 L.Ed. 2d 374, 381(1966)).

" . . . it is the right to use the premises that is a factor determinative of standing. If the defendant is legally occupying, or has been granted a right to occupy the premises, even though he is not physically present at the time of the search, then his privacy has been invaded by a search of these premises. . . ." (Spinelli v. U.S., 382 F2d 871, 879 (8th Cir. Mo. 1967) Rev'd on other grounds, 393 U.S. 410 (1969)).

Applying these principles to Section 252.100 (2) RSMo 1959, we believe this statute cannot be construed to authorize conservation agents to search without a warrant a cabin located on a State Park during the time it is rented to a park visitor. While rented to the park visitor, and whether or not he is physically within the cabin, it should be secure against governmental search without a warrant.

It is the opinion of this office that an agent of the Missouri Conservation Commission, acting pursuant to Section 252.100 (2) RSMo 1959, may not in search of illegal game enter a cabin at a state park while the cabin is properly rented to a park visitor unless he has a valid search warrant or the visitor's consent to the entry.

Yours very truly,

JOHN C. DANFORTH
Attorney General

PRIVATE WATCHMEN:
POLICE:
ST. LOUIS CITY:

Employees of Brink's, Inc. who act as armed guards within the City of St. Louis, must be licensed by the Board of Police Commissioners of the City of St. Louis.

OPINION NO. 282

July 1, 1970

Mr. Richard M. Miller
Acting Secretary
Board of Police Commissioners
1200 Clark Avenue
St. Louis, Missouri 63103



Dear Mr. Miller:

This opinion is in response to your request concerning the following questions with respect to Brink's Inc.

"1. Are employees of Brink's, Incorporated, who act as armed guards for the transportation of money receipts and other valuables from local business to bank depositories, Private Watchmen or Private Policemen within the meaning of the statutory language used in Section 84.340, R.S.Mo., 1959?

"2. By virtue of Section 84.340, R.S.Mo., 1959, does the Board of Police Commissioners have authority to require that armed guards employed by Brink's who work in the City of St. Louis engaged in both inter and intra state commerce be licensed as private watchmen?"

Section 84.340, RSMo 1959, states in full as follows:

"The police commissioner of the said cities shall have power to regulate and license all private watchmen, private detectives and private policemen, serving or acting as such in said cities, and no

Mr. Richard M. Miller

person shall act as such private watchman, private detective or private policeman in said cities without first having obtained the written license of the president or acting president of said police commissioners of the said cities, under pain of being guilty of a misdemeanor."

We view Section 84.340 as a direct grant of powers and not as a limitation upon the board's authority to perform its duties. Obviously, this section prohibits such a person from acting as a private watchman, private detective, or private policeman in the City of St. Louis without first having obtained a written license.

Under this section, Brink's itself is not regulated as a corporation. However, individuals who intend to or do act in such capacities must comply with the licensing requirements. The terms "private watchmen" or "private policemen" have no technical or peculiar meaning and can be taken in their plain or ordinary and usual sense. The term "watchman" is said to be a common law equivalent of what is now known as "policeman". Balentine's Law Dictionary, 4th Edition, p. 1761, Frank v. Wabash Railroad Co., 295 S.W.2d 16 (Mo.Sup. 1956).

In view of the fact that Section 84.340 was enacted for the public protection, it is our view that such terms must be broadly construed even though that section also imposes a criminal penalty for violation. It is also our view that persons who fall within these definitions are not excluded because they perform a private guard, watch, or police function for a private corporation. Any other construction would do violence to the intent of the legislature in enacting Section 84.340. We, therefore, conclude that persons who work as private watchmen or private policemen for Brink's, Inc., within the City of St. Louis are within the meaning of the section and are required to be licensed by the board of police commissioners of the City of St. Louis.

Your second question asks whether the board has the authority to require that armed guards employed by Brinks who work in the City of St. Louis and who are engaged in both inter and intra state commerce be licensed as private watchmen. In this respect, we are additionally informed that Brinks, Inc., contends that such licensing would constitute an undue burden on their activities in interstate commerce. We have no information concerning in what respect Brink's claims such activities would unconstitutionally interfere with their activities in commerce, and do not wish to indulge in speculation. In this respect, we see no reason why

Mr. Richard M. Miller

such armed guards should be exempted from the requirements or the penalty of Section 84.340. It was hardly intended by the legislature to exempt such persons merely by reason of the fact that their activities might carry them beyond the boundaries of the City of St. Louis or beyond the boundaries of the state lines. Meyers v. Matthews, 270 Wis. 453, 71 N.W.2d. 368 (Wis.Sup. 1955) appears to dispose of this question.

We conclude in answer to your second question, that such armed guards who perform such duties within the City of St. Louis are subject to the provisions of Section 84.340.

CONCLUSION

It is the opinion of this office that employees of Brink's, Inc. who act as armed guards within the City of St. Louis, must be licensed by the Board of Police Commissioners of the City of St. Louis.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

A handwritten signature in black ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

SCHOOLS:

The board of education of a school district (except a metropolitan school district which is not included in this opinion) may not enter into a written contract providing for the placing of advertising posters on the interior of school buses.

OPINION NO. 286

July 10, 1970

Honorable Jack E. Gant
State Senator
Sixteenth District
9515 East 29th Street
Independence, Missouri 64052



Dear Senator Gant:

This official opinion is issued in response to your request for a ruling on the following question:

"I have received an inquiry from the School Board of one of the school districts in my Senatorial District. This Board desires to know whether or not they may enter into a contract giving approval to an advertising firm to place advertising posters on school buses, with the school board retaining the right of approval of the advertising. From said advertising, the school board would receive 25% of the gross revenue with 10% being allocated to the bus contracting firm."

We were subsequently advised that this request pertains only to the placing of advertising posters inside school buses. Therefore, this opinion will concern itself solely with whether the school board has the power to enter into an agreement to place advertising inside school buses.

Honorable Jack E. Gant

In determining whether the school board has the power to enter into an agreement to place advertising in its school buses, it must be remembered that the board of directors of a school district is a creature of statute and that its members can exercise no authority unless the same is expressly conferred or arises by necessary implication from powers which are expressly conferred. In Wright v. Board of Education of St. Louis, 295 Mo. 466, 246 S.W. 43 (1922) the Missouri Supreme Court stated as follows:

"The power of the board to make the rule in this case is to be considered prior to a determination of its reasonableness. The power delegated by the Legislature is purely derivative. Under a well-recognized canon of construction, such powers, however remedial in their purpose, can only be exercised as are clearly comprehended within the words of the statute or that may be derived therefrom by necessary implication; regard always being had for the object to be attained. Any doubt or ambiguity arising out of the terms of the grant must be resolved in favor of the people. Watson Seminary v. Pike County Court, 149 Mo. loc. cit. 70, 50 S.W. 880, 45 L. R. A. 675, and cases; Armstrong v. School Dist., 28 Mo. App. 180; 25 R. C. L. p. 1091; section 306 and notes.

"This does not mean that the grant need contain a specification of each act authorized to be done, but that the words used be sufficiently comprehensive to include the proposed act. Express authority may be general as well as particular, and, although not defined in words, it must be clearly inferable from the purpose of the act." Id. at 45.

See, also, State v. Kessler, 136 Mo.App. 236, 117 S.W. 85 (1909); Cape Girardeau School District No. 63 v. Frye, 225 S.W.2d 484 St.L. Ct.Apps., 1949) and Consolidated School District No. 6 v. Shawhan, 273 S.W. 182 (K.C. Ct.Apps., 1925).

School districts have the power to contract only for those things which are within the scope and contemplation of their authority and power, McClure Brothers v. School District of Tipton,

Honorable Jack E. Gant

79 Mo.App. 80, 86 (1899) and Section 432.070, RSMo 1959.

Therefore, it is necessary to review the statutes authorizing school districts to provide bus transportation to ascertain if, either expressly or impliedly, the school district is authorized to enter into contracts permitting advertising to be placed on school buses. (In this review of the statutory authority underlying bus transportation in public schools, we will make no reference to statutes pertaining only to metropolitan school districts. The reason for this is that no metropolitan district is contained in your senatorial district and, therefore, we assume the district in question is not a metropolitan district.) The basic statute providing for transportation of pupils within all except metropolitan districts is Section 167.231, RSMo 1967 Supp., which states as follows:

"Within all school districts except metropolitan districts the school board shall provide transportation to and from school for all pupils living more than three and one-half miles from school and may provide transportation for all pupils living one mile or more from school. When the school board deems it advisable, or when requested by a petition signed by ten taxpayers in the district, to provide transportation to and from school at the expense of the district for pupils living more than one-half mile from school, the board shall submit the question at an annual or biennial meeting or election or a special meeting or election called for the purpose. Notice of the meeting or election shall be given as provided in section 162.061, RSMo. If two-thirds of the voters, who are taxpayers, voting at the election or meeting, are in favor or providing the transportation the board shall arrange and provide therefor."

Section 167.241, RSMo 1967 Supp. provides for the transportation of high school pupils to another district as follows:

"Transportation for high school pupils whose tuition the district of residence is required to pay by section 167.131 may be provided by either the school board of the district of residence or by the school board of the district attended but any cost incurred by the district attended in transporting a

Honorable Jack E. Gant

pupil in excess of the amount allowed for state aid as determined in section 163.161, RSMo, may be collected from the district of the pupil's residence."

Paragraph 3 of Section 178.260, RSMo 1967 Supp. provides for the transportation of exceptional children in the district in the following terms:

"Each board of education may provide transportation to and from school for all exceptional children in the district who cannot otherwise attend programs, and shall receive state aid for their transportation as provided in section 163.161, RSMo."

Section 171.131, RSMo 1967 Supp., authorizes the board of directors of an elementary school district to send pupils in grades 7 and 8 to an approved school in another district.

Section 171.121 provides that the State Board of Education has the power to require the board of a district which has an average daily attendance of less than 15 pupils to transport the pupils of the district to other public schools. Section 171.111, RSMo 1967 Supp., provides for the temporary combination of districts and for the transportation of pupils to a school house elsewhere.

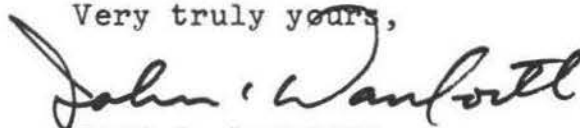
None of these statutes expressly authorize a school district to enter into contracts permitting advertising to be placed on school buses. Furthermore, we do not believe that this authorization is clearly comprehended within the words of any of these statutes or that this authorization can be derived therefrom by necessary implication.

CONCLUSION

It is, therefore, the conclusion of this office that the board of education of a school district (except a metropolitan school district which is not included in this opinion) may not enter into a written contract providing for the placing of advertising posters on the interior of school buses.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, D. Brook Bartlett.

Very truly yours,


JOHN C. DANFORTH
Attorney General

Answer by letter-Wieler

May 7, 1970

OPINION LETTER NO. 287

Honorable John C. Vaughn
Comptroller and Budget Director
State Capitol
State of Missouri
Jefferson City, Missouri 65101



Dear Mr. Vaughn:

This is in response to your request for an opinion with regard to House Bill No. 52, passed by the 75th General Assembly and enacted into law October 13, 1969. Specifically, you ask whether the state or the county is liable for the costs incurred by the sheriff who returns a person to this state after extradition has been waived by that person pursuant to House Bill No. 52 and further, you ask whether these costs are to be paid as provided under Chapter 550, RSMo, or whether they should be paid as extradition costs under Section 548.241, RSMo, if the state is liable for these costs.

House Bill No. 52 provides:

"Section 1. In any criminal proceeding wherein a court in this state has issued a warrant for the arrest of a person and that person was arrested in an adjoining state and then that person waives extradition and consents to return to this state, all necessary expenses, which would be paid by the state if there had been extradition, incurred by the sheriff or his deputy in returning the person shall be paid to the sheriff and shall be taxed as costs in the criminal proceeding."

The bill expressly provides that these expenses are to be taxed as costs in the criminal proceeding initiated in this state against

Honorable John C. Vaughn

the fugitive. In determining who is responsible for these costs, reference must be made to Chapter 550 of the Revised Statutes of Missouri. No further answer can be given to your first question without having the facts of a particular case at hand.

With respect to your second question, if the state is liable for these costs, they should be paid as provided under Chapter 550 of the Revised Statutes of Missouri. The expenses incurred by the sheriff or his deputy in returning a fugitive from an adjoining state where that person waives extradition and consents to return cannot be paid as extradition costs under Section 548.241, RSMo, for the simple reason that they are not extradition costs. Section 548.241 only deals with those costs which arise when the governor makes a formal demand upon the executive authority of another state and issues a governor's warrant naming a specific agent as the governor's representative for purposes of returning the fugitive from the other state pursuant to Section 548.221, RSMo 1959. House Bill No. 52 refers to extradition for the sole purpose of determining which expenses incurred by the sheriff or his deputy in returning the fugitive to this state shall be taxed as costs. These expenses are defined as those necessary expenses "... which would be paid by the state if there had been extradition," Therefore, Section 548.241, RSMo, should be looked at in determining what expenses are paid by the state where there has been extradition; but the expenses incurred by the sheriff or his deputy in returning a fugitive from an adjoining state where that person has waived extradition and consents to return, once determined, should be submitted under the provisions of Chapter 550, RSMo, the same as other criminal costs.

Yours very truly,

JOHN C. DANFORTH
Attorney General

SOCIAL SECURITY: 1. The county is liable for payment of the
COUNTY ASSESSORS: tax on wages paid by the county to its Col-
COUNTY COLLECTORS: lector, his deputy and clerical employees,
without limitation except as contained in
the Social Security Act. Payment by the Collector of wages to deputy
and clerical personnel from the amount the Collector is authorized to
retain for deputy and clerical hire under Section 52.280, House Bill
No. 399, 75th General Assembly, is payment by the county insofar as
social security is concerned. 2. The county is liable for payment
of tax on wages paid by the county to clerical and stenographic as-
sistants of a third class county assessor.

OPINION NO. 288

April 29, 1970

Honorable Allen S. Parish
Prosecuting Attorney
Saline County Court House
Marshall, Missouri 65340



Dear Mr. Parish:

This official opinion is rendered pursuant to the request con-
tained in your letter wherein the following questions are raised:

"1. The Saline County Collector presently earns commissions based on subsection (14) of Section 52.260, V.A.M.S. Section 52.280 V.A.M.S. Pocket Part, permits collectors to retain 70% of commissions and fees for the payment of deputy and clerical hire. The question is, who should pay the O.A.S.I. for the Collector and his deputy and clerical hire, the Collector or the County, and to what percentage limit of the Collector's commissions and fees, if there is a limitation?

"2. The Saline County Assessor has appointed clerical and stenographic assistants. Under Section 53.095, V.A.M.S., should the County (a class 3 county) pay O.A.S.I. on such assistants only up to \$1200.00 per year or is the County authorized to pay a larger amount of O.A.S.I.?"

A prior opinion of this office, i.e., Attorney General Opinion No. 99, issued May 24, 1956, to James E. Woodfill, a copy of which is enclosed herewith, reached the conclusion that:

"Deputies and assistants to recorder of deeds, third class township organization counties, who are appointed and paid compensation under provisions of Sec. 59.250, Laws of Mo.1953, p.372, are 'county employees' within the meaning of Old Age and Survivors Insurance Law, Ch.105, RSMo Cum. Supp.1955 and Federal Social Security Laws, if county has sufficiently complied therewith to have employees covered. In such event, counties are liable for employers' portion of tax required by Sec. 3111, Subchapter (b), Federal Insurance Contributions Act."

We believe that the views expressed in this opinion are applicable to the present inquiry and that the Collector, his deputy and clerical help and the clerical and stenographic assistants of the Assessor are county employees. Under these circumstances the county is liable for payment of the employer's portion of the tax on wages paid to these employees.

Furthermore, it is our view that the county would be liable for the payment of the employer's share of the tax on all wages paid these employees by the county.

CONCLUSION

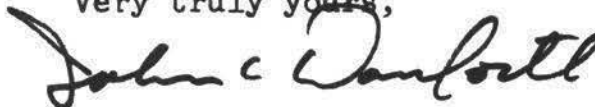
It is therefore the opinion of this office that:

1. The county is liable for payment of the tax on wages paid by the county to its Collector, his deputy and clerical employees, without limitation except as contained in the Social Security Act. Payment by the Collector of wages to deputy and clerical personnel from the amount the Collector is authorized to retain for deputy and clerical hire under Section 52.280, House Bill No. 399, 75th General Assembly, is payment by the county insofar as social security is concerned.

2. The county is liable for payment of tax on wages paid by the county to clerical and stenographic assistants of a third class county assessor.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John E. Park.

Very truly yours,



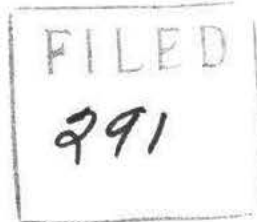
JOHN C. DANFORTH
Attorney General

Encls:
OP.No.99-Woodfill-1956

April 10, 1970

Answered by - Sikes
OPINION LETTER NO. 291

Honorable William Y. McCaskill
Superintendent
Division of Insurance
Department of Business &
Administration
100 East Capitol Avenue
Jefferson City, Missouri 65101



Dear Mr. McCaskill:

By a letter dated April 9, 1970, you requested an opinion as to whether documents submitted by the corporators of the ERC Life Insurance Company are in accord with the Constitution and laws of this State and of the United States.

The documents consist of the following: the Declaration of Intent of the original incorporators of the ERC Life Insurance Company, the proposed Articles of Incorporation of such corporation to be formed under the provisions of Chapter 376, RSMo 1959, as amended, and, the Publishers' Affidavit as to publication of said Articles as required by Section 376.050, RSMo 1959.

An examination of the documents above referred to, pursuant to the requirements of Section 376.070, RSMo 1959, has been made. This office finds the documents to be in accord with the provisions of Chapter 376, RSMo 1959, as amended, and not inconsistent with the Constitution and laws of this State and of the United States.

Yours very truly,

JOHN C. DANFORTH
Attorney General

ELECTIONS:
CITY ELECTIONS:
CITIES, TOWNS AND
VILLAGES:

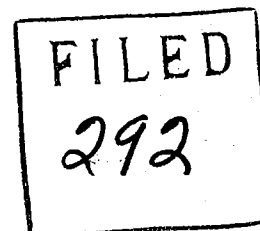
If the City of Kirksville schedules an election on the same date as a statewide primary election, the provisions of Section 111.111, RSMo 1969 are automatically applicable. Furthermore,

the Adair County Court has no power or authority to prevent the City from scheduling an election on the same day as a statewide primary election.

OPINION NO. 292

July 28, 1970

Mr. Clifford Mayberry
Assistant Prosecuting Attorney
Adair County Courthouse
Kirksville, Missouri 63501



Dear Mr. Mayberry:

This official opinion is issued in response to your request for a ruling on the following question:

"The City of Kirksville wants to hold their election at the same time as the August Primary. They have five ballots to vote on. The Adair County Court does not want to go along with this. Is there anything in the statutes that says they have to?"

We assume that your question pertains to Section 111.111, RSMo 1969, which requires that when any political subdivision holds an election on the same day as a statewide general, primary or special election, common polling places will be designated by the county clerk or board of election commissioners. Section 111.111 states as follows:

"Elections of several subdivisions on same day to be held together--who conducts--penalty for failure to comply

"1. Notwithstanding any other provisions of law, whenever any general, primary or special election and elections held by a school, fire or sewer district, municipality or other political subdivision

Mr. Clifford Mayberry

are held on the same day, the county clerk, board of election commissioners or other official having authority over general elections shall designate one polling place for the several elections in each precinct or district in the political subdivision in which the elections are held.

"2. The county clerk, board of election commissioners or other proper official shall designate the election officials in each polling place who shall conduct the election for all subdivisions involved.

"3. Any person failing or refusing to comply with the provisions of this section is guilty of a misdemeanor."

Kirksville is a municipality and August 4 is the date of the statewide primary election. Therefore, if Kirksville may legally schedule a municipal election of August 4, the provisions of Section 111.111 would be applicable unless the Adair County Court has the power to veto Kirksville's selection of August 4 as an election date.

Kirksville is a third class city with a commission form of government. See Sections 78.010 through 78.420 RSMo, 1969. As such, it is required to elect a mayor and councilmen on the first Tuesday in April every four years. See Section 78.080, RSMo 1969 and Section 77.040, RSMo 1969. On the second Tuesday preceding this general municipal election, a primary election must be held to nominate candidates to be voted for at the general election. Section 78.090, RSMo 1969. In addition to the general election, a third class city may hold special elections on various issues. For instance, Section 94.060, RSMo 1969, authorizes the holding of a special election to increase the municipal tax rate. Section 95.145, RSMo 1969, authorizes the holding of a special election on a proposition to incur debt for the city. Section 100.110, RSMo 1969, provides for the holding of a special election to authorize the issuance of revenue bonds for industrial development projects. Section 100.090, RSMo 1969, authorizes the holding of a special election on a proposition to issue general obligation bonds for industrial development. None of the statutes authorizing a third class city to hold a special election specify a date upon which it must be held. Therefore, we conclude that Kirksville could schedule on August 4, 1970, a special election on any proposition authorized by the statutes pertaining to third class cities.

Mr. Clifford Mayberry

Assuming that Kirksville does schedule a special election on certain propositions on August 4, 1970, does the Adair County Court have any power or authority to veto the selection by Kirksville of August 4 as an election day? We have found no statute granting to a county court the power to veto the selection by a third class city of a date for a municipal special election.

Section 111.111 requires that the county clerk, not the county court, designate polling places and election officials for joint elections coming within the terms of this statute. However, no power or authority is granted to the county clerk to prevent a political subdivision from scheduling an election on the same day as a general, primary or special election. Therefore, if the City of Kirksville schedules an election for the same day as the statewide primary election, the provisions of 111.111 automatically become applicable.

CONCLUSION

It is the conclusion of this office that if the City of Kirksville schedules an election on the same date as a statewide primary election, the provisions of Section 111.111, RSMo 1969 are automatically applicable. Furthermore, the Adair County Court has no power or authority to prevent the City from scheduling an election on the same day as a statewide primary election.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, D. Brook Bartlett.

Very truly yours,



JOHN C. DANFORTH
Attorney General

CONSTITUTIONAL LAW:
APPROPRIATIONS:
SCHOOLS:
STATE UNIVERSITY:
STATE COLLEGES:

The term "public education" as used in Article III, Section 36 of the Missouri Constitution includes within its meaning and refers to appropriations for state colleges, universities, public schools and junior college districts.

OPINION NO. 293

June 1, 1970

Honorable John J. Johnson
State Senator - 15th District
11001 Patrina Court
Affton, Missouri 63123

Honorable Richard M. Webster
State Senator - 32nd District
1725 South Garrison
Carthage, Missouri 64836



Dear Sirs:

This letter is in response to your request for an opinion on the following question:

Do state colleges, universities, public schools and junior college districts fall within the term "Public Education" as it is used in Article III, Section 36 of the Missouri Constitution?

Article III, Section 36 of the Missouri Constitution provides in part:

"All appropriations of money by successive general assemblies shall be made in the following order:

Second: For the purpose of public education."

Article III, Section 36 was taken from the Constitution of 1875, Article IV, Section 43. Such section provided in pertinent part:

Honorable John J. Johnson
Honorable Richard M. Webster

"All appropriations of money by the successive General Assemblies shall be made in the following order:

Third, For free public school purposes."

As can be seen from comparing the two provisions, the wording relating to appropriations for "public education" was changed from the wording of the Constitution of 1875 relating to appropriations for "free public school purposes." The reason for this change was described in the debates of the Constitutional Convention of 1945, page 5056:

"MR. MC REYNOLDS: Mr. President, the first paragraph of that section is a copy of the present Constitution. The eight subdivisions or allotments for the appropriations of funds represents some change and some additions from the present section. The present section contains seven sections. This one as rewritten contains eight and is changed from the original one by the addition of, I think, public health and public welfare. There was some question in the Committee as to the wisdom and propriety of this particular section or the necessity of it. However, the majority of the members of the Committee thought it represented an excellent safeguard and since a provision of that kind was in the present Constitution they were inclined to retain it, and for that reason, with the re-writing of the classifications to conform to the present conditions, the old section has been retained. I move its approval." (Emphasis added).

From the above cited motive for changing the wording of Article III, Section 36, supra, it appears that it was the intent of the drafters of the aforementioned provision to broaden the scope of the priority concerning public education. This is supported by the fact that the phrase "free public schools" is used repeatedly in Article IX of the Missouri Constitution and relates only to the gratuitous instruction of all persons in the State of Missouri who are less than twenty-one years old as prescribed by law. However, in Article IX (Article IX, Section 9 (b), Missouri Constitution) the following provision is found:

"The general assembly shall adequately maintain the State University and such other educational institutions as it may deem necessary."

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Honorable Richard M. Webster

Thus, it is clear that the term "free public schools" does not include the state university and other state educational institutions established by the legislature. Therefore, the priorities listed in Article III, Section 36 of the Missouri Constitution and relating to the "public education" are broader in scope than the former provisions of the Constitution of 1875, relating to the priorities for "free public school purposes." As the drafters of the Constitution made provisions for the state university and other educational institutions established by the legislature in the same section that provisions is made for the free public schools of this state, it is clear that the drafters of the Constitution considered the term "public education" to include not just the "free public schools," but also the state university and any other educational institution established by the legislature.

Given this background, the institutions described in your opinion request all fall within the term "public education."

CONCLUSION

Therefore, it is the opinion of this office that the term "public education" as used in Article III, Section 36 of the Missouri Constitution includes within its meaning and refers to appropriations for state colleges, universities, public schools and junior college districts.

The foregoing opinion, which I hereby approve, was prepared for me by my assistant, Thomas L. Patten.

Very truly yours,



JOHN C. DANFORTH
Attorney General

July 17, 1970



OPINION LETTER NO. 294

Honorable E. J. Cantrell
State Representative
Thirty-third District
3406 Airway
Overland, Missouri 63114

Dear Representative Cantrell:

This letter is in answer to your question asking what action a city of the fourth class, within a first class county having a charter form of government, may take in the event of the disqualification of the municipal judge because of illness, absence or disability.

Section 98.500, House Bill No. 199, Seventy-fifth General Assembly, V.A.M.S., states in part:

"The mayor and board of aldermen of cities of the fourth class located in any county of the first class with a charter form of government shall, by ordinance, provide for the election or appointment of a municipal judge, who shall be licensed to practice as an attorney in this state; except that, any person who is holding the office of police judge in any fourth class city on October 13, 1969, shall be eligible for the office of police judge without being licensed to practice law. Any person who is elected municipal judge shall be a resident of the city during his term of office. A person appointed municipal judge need not be a resident. The person who is appointed to serve as municipal judge may also serve as municipal judge in some other fourth class city or town or village." (Emphasis added).

Honorable E. J. Cantrell

Under Section 98.510, V.A.M.S., the municipal judge of a fourth class city:

" . . . in any first class county with a charter form of government, shall be conservators of the peace, and shall have exclusive original jurisdiction to hear and determine all offenses against the ordinances. . ."

Thus, under provisions of the statute no one except the municipal judge can hear the case nor is there anyone else to whom the case may be transferred under Rule 37.91 of the Missouri Supreme Court on "Practice and Procedure in Municipal Courts."

Your attention is invited to the fact that the Missouri Supreme Court under authority of Article V, Section 6 of the Missouri Constitution exercises the authority to transfer a municipal judge from one city to another for good cause shown such as illness, absence or disability of the incumbent.

Very truly yours,

JOHN C. DANFORTH
Attorney General

COUNTIES:
CITIES, TOWNS, AND
VILLAGES:
TAXATION (CITIES
TOWNS AND VILLAGES):
COOPERATIVE AGREEMENTS:

The county court of Clay County and a municipality of said county may enter into a contract, under the cooperative agreement statute (Section 70.220, RSMo 1969) whereby the municipality may use the county computer and the tax information stored thereon, for the purpose of mechanically producing a tax statement for each individual taxpayer.

OPINION NO. 296

August 21, 1970

Honorable William S. Brandom
Prosecuting Attorney
Clay County Court House
Liberty, Missouri 64068



Dear Mr. Brandom:

This is in answer to your letter requesting an opinion of this office "... concerning whether Clay County could contract with municipalities in the county to extend taxes for them." Specifically you ask whether the county court of Clay County can lease its computers and the tax information stored thereon to a municipality in Clay County. You further inquire as to whether a municipality, having contracted to lease computers and the tax information thereon from Clay County, could then in turn contract with someone of their choosing to operate said computers.

Article VI, Section 16, Constitution of Missouri, provides:

"Any municipality or political subdivision of this state may contract and cooperate with other municipalities or political subdivisions thereof, or with other states or their municipalities or political subdivisions, or with the United States, for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service, in the manner provided by law."

Honorable William S. Brandom

This section of the Constitution authorizes the legislature to pass laws respecting cooperative agreements between a municipality and a political subdivision for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service. Implementing this constitutional provision, the legislature enacted Section 70.220, RSMo 1969, which provides:

"Any municipality or political subdivision of this state, as herein defined, may contract and cooperate with any other municipality or political subdivision, or with an elective or appointive official thereof, or with a duly authorized agency of the United States, or of this state, or with other states or their municipalities or political subdivisions, or with any private person, firm, association or corporation, for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service; provided, that the subject and purposes of any such contract or cooperative action made and entered into by such municipality or political subdivision shall be within the scope of the powers of such municipality or political subdivision. If such contract or cooperative action shall be entered into between a municipality or political subdivision and an elective or appointive official of another municipality or political subdivision, said contract or cooperative action must be approved by the governing body of the unit of government in which such elective or appointive official resides."

For the purposes of this opinion, we understand you define the phrase, "extend the taxes" as the mechanical production of the tax statement for each individual taxpayer. Thus, the question is whether the county court of Clay County has authority to lease its computers and such information as may be mechanically reproduced regarding tax information to a municipality of Clay County for this specified purpose.

This office in construing Section 70.200, RSMo 1969, has held the City of Columbia in Boone County, may cooperate in the acquisition and building of an office to be used jointly for

Honorable William S. Brandom

administrative offices (Opinion of the Attorney General No. 237, Parker, 11-14-68); has held the City of Mexico Library and the Audrain County Library District authorized to expend funds co-operatively to remodel a building for the use of both (Opinion of the Attorney General No. 141, O'Halloran, 6-16-67); has held that a county court and a special road district may contract with each other for the maintenance of public roads located in the special road district (Opinion of the Attorney General No. 4, Evans, 12-9-66); has held that the section authorizes a municipality to enter into a contract with another municipality for common police protection (Opinion of the Attorney General No. 258, Avery, 11-4-63); has held that St. Louis County, may contract with third and fourth class cities in that county to collect city real and personal property taxes (Opinion of the Attorney General No. 230, Holman, 3-29-66); has held that a county, through its county clerk, may contract with municipalities of that county to extend the taxes of said municipalities, (Opinion of the Attorney General No. 23 Kuhlman, 1-23-70). As is obvious from the foregoing, the intent of the legislature has been to enunciate a liberal policy dealing with the cooperation between political subdivisions in this state. The overriding statutory concern, however, in this area is ". . . that the subject and purposes of any such contract or cooperative action made and entered into by such municipality or political subdivision shall be within the scope of the powers of such municipality or political subdivision. . . ."

The issuance of tax statements is within the scope of the powers of the contracting political subdivisions, and therefore it is the conclusion of this office that Clay County can contract with a municipality of Clay County for the use of a county computer, and the tax information stored thereon, under the cooperative agreement statute, for the purpose of mechanically producing the tax statement for each individual taxpayer.

You further inquire as to whether a municipality, having contracted with the county court of Clay County, for the use of its computers and the tax information stored thereon, can then in turn contract with someone of their own choosing to operate said computers. It is unnecessary to decide this question because once a municipality of Clay County has obtained access to the computers, its method of utilizing the computer, whether by city officer, employee, or by contract, is governed by its authority as defined by the Constitution, statutes, and ordinances, and the terms of the contract between the county and the municipality.

CONCLUSION

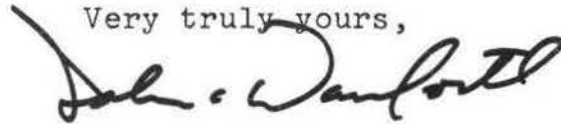
It is, therefore, the opinion of this office that:

Honorable William S. Brandom

The county court of Clay County and a municipality of said county may enter into a contract, under the cooperative agreement statute (Section 70.220, RSMo 1969) whereby the municipality may use the county computer and the tax information stored thereon, for the purpose of mechanically producing a tax statement for each individual taxpayer.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Kenneth M. Romines.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and "D".

JOHN C. DANFORTH
Attorney General

MOTOR VEHICLES:
LICENSES:
MOTOR VEHICLE LICENSES:

A resident of Missouri who is a partner of a Kansas firm that is a registered motor vehicle dealer in Kansas may operate a motor vehicle owned by the Kansas firm in Missouri using only the Kansas dealership license plates.

October 1, 1970

OPINION NO. 298

Honorable John Crow
Prosecuting Attorney
Greene County Court House
Springfield, Missouri 65802



Dear Mr. Crow:

This is in reply to your request for an official opinion of this office concerning the following question:

"May a resident of Missouri who is a registered motor vehicle dealer in an adjoining state operate one of his motor vehicles in Missouri using only his dealer's license issued by the adjoining state?"

Our inquiry subsequent to the receipt of your original request has revealed that the motor vehicle in question is owned by a Kansas car dealership, a partnership firm with Kansas residency, of which the individual in question is a partner.

Chapter 301 of the Revised Statutes of Missouri deals with registration and licensing of motor vehicles. Section 301.020 provides that every owner of a motor vehicle which shall be operated or driven upon the highways of this state shall annually file an application for registration "except as herein otherwise expressly provided." This section alone would appear to require any motor vehicle operated in Missouri to have a Missouri license, regardless of the residence of the owner.

However, Section 301.271, RSMo 1969, provides, so far as is pertinent here, that:

" . . . a nonresident owner, owning any motor vehicle which has been duly registered for the

Honorable John Crow

current year in the state, District of Columbia, territory or possession of the United States, foreign country or other place of which the owner is a resident, and which at all times when operated in this state has displayed upon it the number plate issued for the vehicle in the place of residence of such owner, may operate or permit the operation of such vehicle within this state without registering such vehicle or paying any such registration fee to this state; but the provisions of this subsection shall be operative to allow such owner to operate or permit the operation of such vehicle owned by a nonresident of this state only to the extent that under the laws of the state, District of Columbia, territory or possession of the United States, foreign country or other place of residence of the nonresident owner, substantially equivalent exemptions are granted to residents of Missouri for the operation of vehicles duly registered in Missouri."

If the motor vehicle in question is the property of a nonresident owner, nonresident being defined in Section 301.010 as "a resident of a state or country other than the state of Missouri" and owner being defined so as to include " . . . any person, firm, corporation or association, who holds the legal title of a vehicle . . . ", then we believe it would be permissible, by virtue of Section 301.271, cited above, for the nonresident owner to " . . . permit the operation of such vehicle within this state without registering such vehicle or paying any such registration fee to this state . . . " only to the extent that under the laws of the state of the nonresident owner substantially equivalent exemptions are granted to Missouri residents for the operation of vehicles duly registered in Missouri.

It is our opinion that the term "owner" includes a partnership and that the Kansas partnership in question qualifies as a "nonresident owner." Therefore, the partnership may operate or permit the operation of the motor vehicle in question in Missouri, subject of course to whether Kansas grants reciprocity to Missouri residents. This certainly would include the operation of the motor vehicle by a partner of the firm. See 40 Am.Jur., Partnership, Sections 107 and 115, on ownership and control of personal property by partners and partnerships.

Kansas does grant reciprocity under K.S.A.1969 Supp.8-138a, which reads as follows:

"Nonresident owners licensed in state of residence; reciprocal privileges. The provisions of this section shall apply only to the nonresident owner or owners of any motor vehicle constructed and operated primarily for the transportation of the driver or the driver and one or more nonpaying passengers. Such nonresident owners, when duly licensed in the

Honorable John Crow

state of residence, are hereby granted the privilege of operation of any such vehicle within this state to the extent that reciprocal privileges are granted to residents of this state by the state of residence of such nonresident owner. [L.1968,ch.180,s.4;July 1.]"

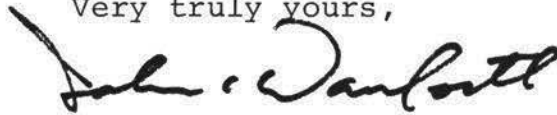
As to the question of the purposes for which a vehicle may be operated with dealer's license plates, your attention is directed to the enclosed Attorney General Opinion No. 355, issued to the Honorable James L. Paul, dated August 18, 1970, interpreting Missouri law, and to the enclosed copy of the portion of Kansas Administrative Regulations setting forth Kansas law on the subject.

CONCLUSION

It is therefore the conclusion of this office that a resident of Missouri who is a partner of a Kansas firm that is a registered motor vehicle dealer in Kansas may operate a motor vehicle owned by the Kansas firm in Missouri using only the Kansas dealership license plates.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Walter W. Nowotny, Jr.

Very truly yours,



JOHN C. DANFORTH
Attorney General

Enclosures:

OP.No.355-Paul-1970
Kans. Adm.Reg.

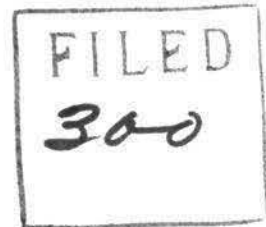
SCHOOLS:
CITIES, TOWNS
AND VILLAGES:
BONDS:
ELECTIONS:

There is no procedure which would authorize setting aside a school levy election because of a shortage of ballots.

OPINION NO. 300

July 2, 1970

Honorable Carl D. Gum
Prosecuting Attorney
Cass County Court House
Harrisonville, Missouri 64701



Dear Mr. Gum:

This is in response to your request for an opinion as to the validity of a school levy election where there was a shortage of ballots which precluded certain voters from voting.

We find no procedure under the laws of this state by which a duly authorized school levy election may be set aside because of election irregularities. The Supreme Court of Missouri has repeatedly held that a contest of an election is statutory and is dependent on express statutory authorization. See, e. g. State ex rel. Conaway v. Consolidated School District No. 4 of Iron County, 417 S.W.2d 657 (Mo. En Banc 1967). Chapter 124, RSMo 1959, provides for election contests. A review of that chapter and other statutory sections reveals no statutory provisions authorizing a contest of a school levy election. In a similar situation involving an election to authorize the issuance of general obligation bonds, the Supreme Court of Missouri held that absent statutory authorization the courts have no power to set aside an election for irregularities in the election procedure. Arkansas-Missouri Power Corporation v. City of Potosi, 355 Mo. 356, 196 S.W.2d 152 (1946).

In another case, Wann v. Reorganized School District No. 6 of St. Francois County, 293 S.W.2d 408 (Mo. 1956), the court refused to allow plaintiffs to contest a school bond election on the ground that nonqualified voters were permitted to vote. In that case it was argued that Article V, Section 14 of the Constitution of Missouri, which provides, "The circuit courts shall have . . . exclusive original jurisdiction in all civil cases not otherwise provided for,

Honorable Carl D. Gum

. . ." permitted the circuit court to hear a case contesting the election. In rejecting that argument, the court noted, l.c. 412:

"We must necessarily conclude that where the provision of the constitution announces a general principle and there is a specific direction to the legislature, as in this case, and no common law remedy exists and the legislature has not acted, then the courts are without jurisdiction to entertain a petition for relief. . . ."

Therefore, it would appear that there is no method by which a school levy election may be declared invalid because of the shortage of ballots.

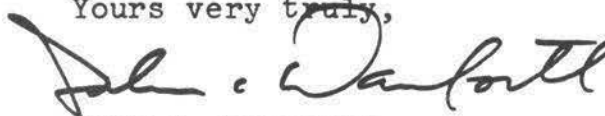
In reaching that conclusion, we note that you ask if the election is "void." The Supreme Court of Missouri has held, that even though for certain types of elections an election contest is not permitted by law, a court of equity may act in those situations where the purported "election" is unauthorized by law and therefore void. Wann v. Reorganized School District No. 6, *supra*. However, inasmuch as no question is raised in your opinion request concerning the election's being authorized by law, the only question being the validity of the conduct of the election, we are of the opinion that where a duly authorized school levy election has been held, there is no procedure by which a school levy election may be set aside because of irregularities in the conduct of the election such as a shortage of ballots. Therefore, the election must be held to be valid.

CONCLUSION

It is the opinion of this office that there is no procedure which would authorize setting aside a school levy election because of a shortage of ballots.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Charles A. Blackmar.

Yours very truly,



JOHN C. DANFORTH
Attorney General

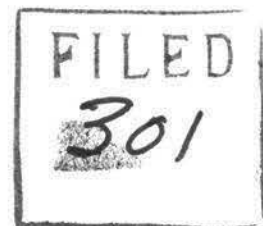
ELECTIONS:
ELECTION JUDGES:
COMMITTEEMEN AND
COMMITTEEWOMEN:

Section 111.171, RSMo 1969, prohibits committeemen and committeewomen from serving as election judges and clerks (1) in any election conducted by a county clerk or a board of election commissioners or (2) in any election in which a countywide proposition is on the ballot or (3) in any election in which candidates for county office are on the ballot.

OPINION NO. 301

October 27, 1970

Honorable Ted Salveter
State Representative
District 142
1005 Woodruff Building
Springfield, Missouri 65806



Dear Representative Salveter:

This letter is in response to your request for clarification of our Opinion No. 237, April 3, 1970, with reference to the following question:

"The conclusion reached in the foregoing opinion was that committeemen and committeewomen of both political parties are interpreted to be 'county officials' and therefore are not qualified to serve as election judges and clerks under Section 111.171 V.A.M.S. 1969-70 Cum. Supp. Much confusion still exists with respect to when and when not, committee people may work at the polls. I refer you particularly to that part of the statute which states that he must not hold office or employment under any political subdivision 'involved in the election to be held at the time of his appointment'. It would seem to me that if a committeeman is a county officer, he could still work in either a city, state or national election.

"I would appreciate it very much if you would let me know whether you agree that

Honorable Ted Salveter

under your original opinion, committeemen would be precluded from serving only in a 'county' election. I also would appreciate it if you could specify what exactly is a county election, a city election, and a state election, within the meaning of this section."

You make specific reference to the following sentence in subsection 1 of Section 111.171, RSMo 1969 which states:

" . . . He [a judge or clerk of any registration or election] must not hold any office or employment under the United States, the State of Missouri, or under the county, city, or other political subdivision involved in the election to be held at the time of his appointment. . . ." (Emphasis supplied.)

We believe that Section 111.171 prohibits people who hold a public office or employment under the United States or the State of Missouri from serving as election judges or clerks in any election. Officers and employees of counties, cities or other political subdivisions are prohibited from serving as election judges or clerks only if the employing entity is "involved in the election to be held at the time of his appointment." When is a "county, city or other political subdivision involved in the election to be held. . . ."?

The primary purpose of statutory construction is to determine the intent of the legislature using the statutory language in question and then to construe the statute so as to give effect to the intention of the legislature. Rosedale-Skinker Imp. Ass'n v. Board of Adjustment City of St. Louis, 425 S.W.2d 929 (Mo. 1968).

By 1.090, RSMo 1969, the legislature has enacted into law the general rule of statutory construction that:

"Words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import."

The word "involved" seems to have no "peculiar and appropriate meaning in law" and should, therefore, be taken in its

Honorable Ted Salveter

"plain or ordinary and usual sense."

The definition of "involved" in Webster's Third New International Dictionary (1961) which is most appropriate to this context is "to relate closely: CONNECT, LINK (the problem is closely involved with the management of pastures. . .)".

Therefore, we believe that the legislature intended to prohibit officials or employees of counties, cities or other political subdivisions from being election judges or clerks in elections in which the entity employing the individual is connected or linked. Such a political entity is connected with elections in either or all of the following ways:

- (1) The election is conducted by the political entity, or
- (2) Propositions submitted to the voters on behalf of the political entity are on the ballot, or
- (3) Candidates for an elective office in the political entity are on the ballot.

A political entity can be involved in an election in any of the foregoing ways. Therefore, office holders or employees of such an entity would not be eligible for appointment as election judges or clerks.

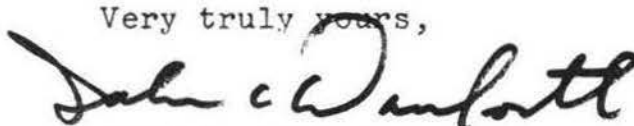
We have previously concluded that committeemen and committeewomen are county officers for the purpose of Section 111.171. See Opinion No. 237, dated April 3, 1970, to you. Therefore, committeemen and committeewomen would be prevented from serving as election judges and clerks in any election in which (1) the county conducts the election or (2) a countywide proposition is on the ballot or (3) candidates for a county office are on the ballot.

CONCLUSION

It is the opinion of this office that Section 111.171, RSMo 1969, prohibits committeemen and committeewomen from serving as election judges and clerks (1) in any election conducted by a county clerk or a board of election commissioners or (2) in any election in which a countywide proposition is on the ballot or (3) in any election in which candidates for county office are on the ballot.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, D. Brook Bartlett.

Very truly yours,



JOHN C. DANFORTH
Attorney General

SCHOOLS: Section 163.081, RSMo 1967 Supp., expresses
STATE AID: the intent of the legislature to make three
APPROPRIATIONS: distributions of moneys out of the State
COMPTROLLER: Public School Fund and that, under the cir-
cumstances set forth in your opinion re-
quest, it would not be in substantial compliance with this intent
to make a supplementary distribution of state school moneys after
the March 15th distribution but before the September 15th distri-
bution.

OPINION NO. 302

May 25, 1970

Honorable John C. Vaughn
Comptroller and Budget Director
Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Vaughn:

This official opinion is issued in response to your request
for a ruling on the following question:

"If the Department of Education submits a
requisition for a supplementary distribu-
tion of State School Moneys in April or
May 1970, would it be proper and in substan-
tial compliance with the law for the Comp-
troller's office to honor the requisition
and issue the checks to the various counties
as requested by the Department of Education?"

As factual background for this question, you provided us with
the following information upon which this opinion is based:

"During the Seventy-fifth General Assembly
Senate Bill No. 1, 185 and 215 was enacted
which provided, in part (7) of Section
163.031, for the distribution of State School
Funds and specifically states in part that,
' . . . the general assembly shall transfer
to the state school moneys fund two hundred
and thirty-four million dollars for fiscal
year 1969-70 less the amount derived from
the tax on cigarettes provided for in Section
149.020. . . ' This bill passed the session
only a few minutes before mandatory adjourn-
ment, therefore, the transfer bill referred
to could not be changed at that late hour.

Honorable John C. Vaughn

"On February 28, 1970, sufficient funds were not available to pay the full amount provided for in the statute. Additional funds as a result of collections from cigarette tax money are deposited directly in the State School Moneys Fund upon receipt. Sufficient funds from the cigarette tax money will accumulate in the State School Moneys Fund whereby the statutory amount could be made by providing a fourth payment to the school districts sometime in the later part of April or the early part of May.

"The Department of Education feels it is desirable and proper for them to make a supplemental payment to the schools in order to fulfill the statutory obligations for the present year. On June 18, 1952 your office rendered an official opinion on a similar situation which held that an additional payment was proper."

An additional fact of significance was furnished by you in a telephone conversation of May 21, 1970. The money which has accumulated in the State School Moneys Fund as of the date of your opinion request will not revert back to general revenue at the end of this fiscal year. Therefore, if the roughly 8.4 million dollars is not paid as a fourth distribution in this fiscal year, it will be available for distribution in the September 15, 1970, payment.

In order to answer your question, it is necessary for us to determine the meaning of Paragraph 2 of Section 163.081, RSMo 1967 Supp., which reads as follows:

"The state board of education upon receipt of the county superintendent's report shall calculate the amount which each school district is to receive and on or before September fifteenth of each year shall distribute all moneys available August thirty-first to the several districts. Additional distributions of all moneys available November thirtieth and February twenty-eighth shall be made on or before December fifteenth and March fifteenth of each school year. The state board of education shall certify the amounts so apportioned to the comptroller for his approval and warrants shall be issued payable to the several counties and forwarded to them. The county treasurer immediately

Honorable John C. Vaughn

upon receiving the money shall distribute and credit to the various school districts in the county the amounts due each district as apportioned and reported to the county treasurer and county clerk by the state board of education."

The applicability of Opinion No. 92, dated June 18, 1952, to Commissioner Hubert Wheeler.

You indicate in your opinion request that this office rendered an official opinion on a similar situation in 1952 which concluded that an additional payment was proper. To determine whether the 1952 opinion would govern the situation described in your opinion request, we must analyze the factual situation to which the 1952 opinion pertains. The General Assembly had appropriated \$7,000,000 over a two-year period for public schools in addition to the basic appropriation for the same purpose. As pointed out on page 2 of the 1952 opinion, the problem was to determine if there was a legal basis for distributing this supplemental appropriation to the public schools after the scheduled payments had been made. The opinion quoted at length from Section 161.040, RSMo 1949, pertaining to the manner and time of apportionment and distribution of public school funds. The following language from paragraph 4 of Section 161.040, RSMo 1949, was emphasized:

"Provided further, that after all apportionments herein provided have been paid in full the state board of education shall apportion, any excess remaining in the public school fund equally among all of the districts of the state. . ."

The opinion concluded as follows:

"With regard to the apportionment of the excess school moneys, it does not appear that any specific time is stated when such apportionment is to be made, and therefore it would seem that said apportionment could be made any time after the specific apportionments provided for in the statute were made and distributed.

"As supplemental information to your opinion request you have informed us that all apportionments specifically provided in Section 161.040, supra, have been paid in full. Consequently it is our thought that the \$3,500,000

Honorable John C. Vaughn

allocated for distribution for the period from July 1, 1951 to June 30, 1952, which would be one half of the appropriation provided for by Section 10.360 of House Bill No. 496, would be excess school moneys which could presently be apportioned and distributed in the manner provided by Section 161.040, pertaining to the apportionment of excess school moneys.

CONCLUSION

"It is therefore the opinion of this department that the State Board of Education can presently make an apportionment and distribution of state school moneys allocated for distribution amounting to \$3,500,000, which is one half of the total biennium appropriation provided for by Section 10.360 of House Bill No. 496, enacted by the 66th General Assembly."

It is apparent from the foregoing that the approval granted for the making of a fourth payment in 1952 was based entirely on the conclusion that the supplemental appropriation made by the legislature created "excess school moneys" and pursuant to the statutory directive in the fourth paragraph of Section 161.040, RSMo 1949, this excess could be distributed as a fourth payment because no time was specified for the distribution of excess school moneys.

To determine if the reasoning of the 1952 opinion would apply to the instant situation, reference must be made to the current statutory authority for the distribution of state school money. The statute authorizing the distribution of excess school moneys is Paragraph 8 of Section 163.031, Senate Bill Nos. 1, 185, and 215, Seventy-Fifth General Assembly:

"It is hereby provided that should the general assembly transfer to the state school moneys fund in any year an amount in excess of the amount necessary to pay the school apportionment as provided in this section, the additional funds shall be distributed to the school districts of the state in the same ratio that the money available bears to the total amounts received by the school districts under the provisions of this section."

Honorable John C. Vaughn

Paragraph 8 of Section 163.031 is not applicable to the current situation because, contrary to the situation in 1952, the General Assembly has not transferred to the State School Moneys Fund an amount in excess of the amount necessary to pay the school apportionment (Any argument that the word "transfer" in Paragraph 8 has reference to the amount derived from the tax on cigarettes provided in Section 149.020 cannot be sustained in light of the wording of the Paragraph 7 which makes it clear that "transfer" refers to an amount of general revenue funds to be placed in the State School Moneys Fund in addition to the amount derived from the tax on cigarettes, which would be automatically paid into the State School Moneys Fund). In fact, just the opposite is the case -- the legislature has not seen fit to transfer to the State School Moneys Fund sufficient moneys so that the school apportionment, as provided in Section 163.031 could be paid in full by March 15th as provided in Section 163.081, RSMo 1967 Supp. Therefore, Paragraph 8 cannot furnish the authority for the making of a fourth payment as did its predecessor in 1952.

Having determined that the factual situation described in your opinion request does not permit the application of the statutory authority relied on in the 1952 opinion to support a fourth payment, we must now turn to the statutes governing the distribution of state money to public schools to determine if, under the circumstances outlined in your opinion request, a fourth payment in this fiscal year would be authorized.

Section 163.031, Senate Bill Nos. 1, 185 and 215, 75th General Assembly, provides the basis for state aid to public schools. Paragraph 7 of this section appropriates no amount to the State Board of Education but merely expresses the intention of the 75th General Assembly to transfer an amount of general revenue which, when added to the revenue produced by the cigarette tax, would total \$234,000,000. At the time this paragraph was enacted by the legislature, Section 168.081, RSMo 1967 Supp., providing the method of distribution of funds out of the State School Moneys Fund, was a valid, outstanding statute. Paragraph 7 does not purport to alter this method of distribution (The problem outlined in your opinion request arises because as of February 28, 1970, the cut-off day for the March 15th distribution, insufficient general revenues had been transferred by the General Assembly to the State School Moneys Fund to total, when added to the cigarette tax moneys received to February 28th, \$234,000,000.).

Paragraph 8 covers the situation where the General Assembly transfers to the State School Moneys Fund an amount in excess of the money necessary to pay the school apportionment as provided in Section 163.031. As previously demonstrated, this paragraph is not applicable to this fact situation.

Honorable John C. Vaughn

In Paragraph 6 of Section 163.031, the legislature directs that if the State school money available is "insufficient to pay in full the amount necessary under the law," the money for each school district shall be reduced pro rata. The "full amount necessary under the law" refers to the amount necessary to fully pay the sum produced by an application of the formula in Paragraph 1 of Section 163.031. See Paragraph 5 of Section 163.031, RSMo 1967 Supp. We are advised that \$234,000,000 is less than full funding of this formula. Therefore, the provisions of Paragraph 6 of Section 163.031 are applicable to this year's distribution of school moneys regardless of whether further payments are permitted. Again, however, Paragraph 6 does not purport to alter the method of distribution of the State School Moneys Fund as provided in Section 163.081.

Paragraph 2 of Section 163.081, RSMo 1967 Supp., prescribes the method by which distributions shall be made from the State School Moneys Fund. Payments are to be made to the school districts on or before September 15, December 15 and March 15 of each school year. Does this section authorize or permit an additional distribution or distributions to be made to the public schools?

In analyzing this statute, we must determine what the legislature intended in enacting it. Primary emphasis must be placed on the language used and all words must be considered in their ordinary and plain meaning. An unambiguous statute should not be construed to be something other than what it was written to be. Christy v. Petrus, 365 Mo. 1187, 295 S.W.2d 122, 126 (1945); Playboy Club v. Myers, 431 S.W.2d 228, 231 (Mo., 1968). When the language of a statute is clear and unambiguous and its meaning clear,

" . . . there is neither reason nor room for judicial construction . . . and we find nothing in Section 443.430 (or in any related statute) which would indicate a legislative intent that the non-technical and commonplace language hereinbefore quoted from the cited statute should be construed otherwise than in its natural, plain and ordinary sense and meaning, or which would afford any legitimate basis for refusal to accept and apply that language honestly and faithfully. . . ." State ex rel Hopkins v. Stemmons, 302 S.W.2d 51, 55 (Sp. Ct.Apps., 1957); State ex rel Cobb v. Thompson, 319 Mo. 492, 5 S.W.2d 57, 59 (1928).

Honorable John C. Vaughn

Whether Section 168.031 is directory or mandatory is not important in answering your question. If a provision is mandatory, the failure to follow it renders the proceeding to which it relates illegal and void. If a provision is a directory, the observance of it is not necessary to the validity of the proceeding. Directory provisions are not intended by the legislature to be disregarded, but where the consequences of not obeying them in every particular are not prescribed, the courts must judicially determine them. State ex rel Ellis v. Brown, 326 Mo. 627, 33 S.W.2d 104 (1930).

Our question is not whether the legislature intended that the three payments specified could validly be made at different times, but whether Section 168.031 authorizes payments in addition to the three specified. Therefore, whether the statute is mandatory or directory is irrelevant to a determination of your question.

The State Board of Education is a public entity and a subordinate branch of the executive department of the State. As such, it has only those powers specifically conferred on it by the Missouri Constitution and statutes and those powers necessary or proper to enable the Board to carry out the responsibilities entrusted to it by the Constitution and statutes. See State ex rel Highway Commission v. County of Camden, 394 S.W.2d 71, 76-77 (Sp. Ct. of App. 1965).

Where a statute limits the doing of a particular thing in a prescribed manner, it necessarily includes in the power granted the negative that it cannot be otherwise done. State ex rel Highway Commission v. County of Camden, supra at 77, and Lancaster v. County of Atchison, 180 S.W.2d 706, 709-352 Mo. 1039 (1944).

Applying the foregoing rules to Paragraph 2 of Section 163.081, we find no ambiguity in the wording of the statute. The language clearly provides for payments to public schools on or before September 15th, December 15th and March 15th of each school year. There is no language from which it could be reasonably concluded that the legislature intended to authorize as many payments as the State Board of Education deemed appropriate. To so determine, would be to ignore certain language of the statute. For instance, there is a six-month period between the March 15th payment and the September 15th payment and a three-month period between the September 15th and December 15th payments and between the December 15th and March 15th payments. The fact that there is a longer period between the March 15th and September 15th payments cannot be assumed to be accidental. The legislature could have intended that the six-month period was necessary to permit the accumulation of a substantial balance in the State School Moneys Fund so that it would be available for distribution to the schools at the beginning of a school year; i.e., in the payment to be made on or before

Honorable John C. Vaughn

September 15th. The legislature could have believed that a substantial initial payment in a school year would permit schools to purchase expendable supplies for the entire year and would permit schools to finance their operations until local tax revenues were available.

That the legislature intended that moneys accumulate for a six-month period between the March 15th and September 15th payments is supported by the wording of Paragraph 2 of Section 163.081. In the first two sentences direction is given that "all moneys available" shall be distributed to the public schools on or before September 15, December 15 and March 15 of each school year. We believe that the words "all moneys available" express a legislative intention that moneys will accumulate in the State School Moneys Fund between the cut-off dates specified in Section 168.031. To permit an additional distribution out of the School Moneys Fund after March 15th and before August 30th would, of necessity, reduce the moneys "available" for distribution on September 15th.

CONCLUSION

Therefore, it is the conclusion of this office that Section 163.081, RSMo 1967 Supp., expresses the intent of the legislature to make three distributions of moneys out of the State Public School Fund and that, under the circumstances set forth in your opinion request, it would not be in substantial compliance with this intent to make a supplementary distribution of state school moneys after the March 15 distribution but before the September 15 distribution.

The foregoing opinion, which I hereby approve, was prepared by my assistant D. Brook Bartlett.

Yours very truly,



JOHN C. DANFORTH
Attorney General

SHERIFF:

COMPENSATION:

A sheriff appointed trustee to execute a deed of trust pursuant to Section 433.340, RSMo 1959, acts in his official capacity and must pay all fees and compensation collected by reason thereof into the county treasury in counties of the third and fourth class under the provisions of Paragraph 3 of Section 57.407 and Paragraph 3 of Section 57.409, both as amended by House Bill No. 165 of the 75th General Assembly. When a deed of trust provides that in the event the named trustee shall refuse or fail to act, the then sheriff of the county shall execute the trust, the sheriff is not acting officially but in his private capacity, and such compensation as he receives for the services is not required to be paid into the county treasury.

OPINION NO. 304

May 7, 1970

Honorable Haskell Holman
State Auditor
Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Holman:

This opinion is in response to your request which is as follows:

"1. When a sheriff is appointed trustee by the Circuit Court to execute a deed of trust, as provided in Section 443.340, R.S.Mo., 1959, are the commissions earned and collected for his services, under the provisions of Section 443.360, RSMo., 1959, considered to be fees in civil matters and to be paid into the county treasury under the requirements contained in paragraph 3 of Sections 1 and 2 of Senate Bill No. 165 (now Sections 57.407 and 57.409)?

"2. When parties in a deed of trust provide that in the event the trustee named therein shall refuse or fail to act and that the then sheriff of the county shall execute the trust, would the commissions earned and collected by the sheriff acting as trustee, under this circumstance, be deemed fees collected in his official capacity and payable

Honorable Haskell Holman

into the county treasury or as fees earned in an individual capacity and same retainable by him?"

Section 443.340, RSMo 1959, to which you refer states:

"If such court shall be satisfied that the facts stated in such affidavit are true, it shall make an order appointing the sheriff, or some other suitable person of the county, trustee to execute such deed of trust, in the place of the original trustees; and thereupon such sheriff, or other suitable person appointed by said court, shall be possessed of all the rights, powers and authority possessed by the original trustee, under the deed of trust, and such sheriff or other person shall proceed to sell and convey the property and to pay off the debts and liabilities according to the directions of the deed of trust, and shall do all other acts the original trustee had power to do, and with the same force and effect."

Paragraph 3 of Section 57.407 (as amended by Senate Bill No. 165 of the 75th General Assembly) states:

"3. In counties of the third class after October 13, 1969, the sheriff shall pay all fees collected by him in civil matters, and which were previously retainable by him, into the county treasury, except charges for each mile traveled, allowable to him, which he may retain, in serving civil process."

Paragraph 3 of Section 57.409 (as amended by the 75th General Assembly) states:

"3. In counties of the fourth class after October 13, 1969, the sheriff shall pay all fees collected by him in civil matters, and which were previously retainable by him, into the county treasury, except charges for each mile traveled, allowable to him, which he may retain, in serving civil process."

In our Opinion No. 78, 3/11/53, Sawyers, (copy enclosed) we noted that the courts have made a distinction as to whether a sheriff is acting officially or individually as trustee under a

Honorable Haskell Holman

deed of trust. Of course it is clear that Section 443.340 provides that the court shall make an order appointing the sheriff or some suitable person trustee to execute such deed of trust in the place of the original trustees. When the sheriff is appointed by the court in place of a trustee to execute the trust deed, he is acting officially. State ex rel v. Griffith et al, 63 Mo. 545 (1876). The State to the Use of v. Taylor, 6 Mo. App. 277, 278 (1878).

However, it is held that when parties by private contract appoint beforehand whosoever at an indefinite time in the future may happen to be sheriff, to sell land under a deed of trust, such parties can not by such an appointment engage the liability of third persons who happen to be the sureties on the bond. State ex rel Chase v. Davis, 88 Mo. 85 (1886).

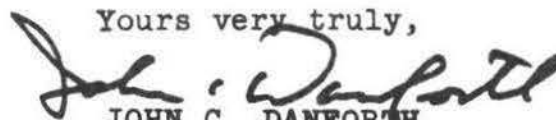
It is our view that a sheriff appointed by the court to execute a deed of trust under Section 443.340 is acting in his official capacity and the fees or compensation he receives by reason thereof constitute "fees collected by him in civil matters and which were previously retainable by him" within the meaning of Paragraph 3 of Section 57.407 and Paragraph 3 of Section 57.409. As a result, sheriffs of third and fourth class counties must pay such fees into the county treasury. The compensation collected by such sheriffs as trustees under a provision in a deed of trust providing that the then sheriff of a county shall execute the trust when the named trustee refuses or fails to act are not fees collected by them officially and are not required to be paid into the county treasury.

CONCLUSION

It is therefore the opinion of this office that a sheriff appointed trustee to execute a deed of trust pursuant to Section 443.340, RSMo 1959, acts in his official capacity and must pay all fees and compensation collected by reason thereof into the county treasury in counties of the third and fourth class under the provisions of Paragraph 3 of Section 57.407 and Paragraph 3 of Section 57.409. When a deed of trust provides that in the event the named trustee shall refuse or fail to act, the then sheriff of the county shall execute the trust, the sheriff is not acting officially but in his private capacity, and such compensation as he receives for the services is not required to be paid into the county treasury.

The foregoing opinion, which I hereby approve, was prepared by my assistant John C. Klaffenbach.

Yours very truly,


JOHN C. DANFORTH
Attorney General

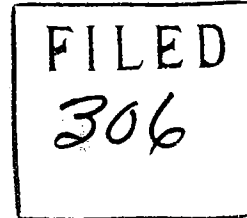
Enc: Opinion No. 78
3/11/53, Sawyers

ELECTIONS:
ELECTION JUDGES:
ELECTION CLERKS:
COMPENSATION:

Section 111.241, RSMo 1969, applicable to certain election judges and clerks, does not limit the compensation for such judges and clerks to \$12.00 per day, but provides that the compensation shall be at least \$12.00 per day.

OPINION NO. 306

July 28, 1970



Honorable Thomas R. Gilmore
Prosecuting Attorney
Scott County
217 South Kingshighway
Sikeston, Missouri 63801

Dear Mr. Gilmore:

This is in reply to your letter of April 14, 1970, requesting an opinion from this office in answer to the following question:

Does Section 111.241, RSMo 1969, now give the election authorities carte blanche in determining how much to compensate judges and clerks of elections?

We set forth Section 111.241:

"Judges and clerks of election shall be paid not less than twelve dollars a day for their services in conducting elections and returning the poll books and ballots to the county clerk's office."

Such section was enacted by Senate Bill No. 134, 75th General Assembly. Its content is similar to repealed Section 111.353, Laws, Missouri 1965, page 237, which provided:

"Any other provision of law to the contrary notwithstanding all judges of elections shall be allowed the sum of not less than twelve dollars a day, and all clerks of election shall be allowed the sum of not less than twelve dollars a day as compensation for their services in conducting elections and returning poll books and ballots to the county clerk's office."

Honorable Thomas R. Gilmore

Section 111.350, RSMo 1959, provided for a maximum payment for judges and clerks of election, as follows:

"All judges and clerks of election shall be allowed such compensation for their services in conducting elections and returning the poll books and ballots to the county clerk's office, as the county courts of their respective counties deem reasonable, not to exceed eight dollars per day, except in townships or precincts where the vote at any election is in excess of six hundred votes the county courts may at their option pay at the rate of fifty cents per hundred for each additional one hundred votes or major fraction thereof, not to exceed ten dollars for any election, to be paid out of the county treasury."

However, unlike Section 111.350, both repealed Section 111.353 and newly enacted Section 111.241 do not set a maximum amount allowed but rather set a minimum amount allowed. It would seem that the legislature's intent was to remove the maximum ceiling and to replace it with a minimum floor; this would remove the need of an amendment as compensation is increased.

The legislature has provided for payment of specific amounts for judges and clerks not coming within the purview of Section 111.241. For example, Section 119.260, RSMo 1969, applicable to counties not having a provision for registration of voters and having a city or part of a city of 400,000 within the boundaries of the county provides as follows:

"The compensation of all judges and clerks of registration and election shall be at the rate of ten dollars for each calendar day or any part thereof. For returning registration books, verification books, ballots and election returns two judges of opposite politics, a judge and a clerk of opposite politics, or the two clerks, as the case may be, from each precinct, shall be paid the sum of two dollars each for going to the office of the board of election commissioners; except in any case where the distance is less than three miles from the office of the board of election commissioners, in which case not to exceed one dollar for each shall be paid."

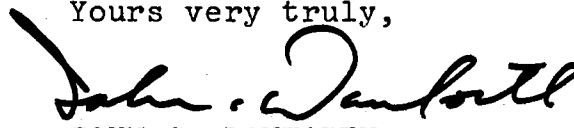
Honorable Thomas R. Gilmore

Since the legislature repealed the section fixing a maximum amount and has enacted other laws providing for payments of specific amounts, it is reasonable to assume that the phrase "not less than" used in Section 111.241 is to be taken as a minimum amount and not as a specific amount or a maximum amount.

CONCLUSION

It is the opinion of this office that Section 111.241, RSMo 1969, applicable to certain election judges and clerks, does not limit the compensation for such judges and clerks to \$12.00 per day, but provides that the compensation shall be at least \$12.00 per day.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

TAXATION (EXEMPTIONS):

Under Article X, Section 6 of the Constitution and Section 137.100, RSMo Supp. 1967, a building in the course of construction intended to be used for charitable purposes but not so used at the time fixed for assessment of taxes is not exempt from taxation.

OPINION NO. 307

June 25, 1970

Honorable John Crow
Prosecuting Attorney
Greene County Court House
Springfield, Missouri 65802



Dear Mr. Crow:

This is in response to your request for an official opinion on the question whether real property owned by the Southwest Missouri Ecumenical Center, Springfield, Missouri, as of January 1, 1970, is subject to ad valorem taxes. You present your question as follows:

"If a not-for-profit corporation acquires real property for the purpose of constructing facilities thereon which, when completed, will be actually and regularly used exclusively for religious worship and purposes purely charitable and not held for corporate profit, but if said facilities are still under construction and not yet occupied on January 1, 1970, and if no other use is being made of said property on said date except the construction of said facilities, is the real property exempt from taxation for the year 1970 by virtue of Section 137.100 (5), RSMo 1959?"

Constitutional exemption from taxation of certain property is provided for in Article X, Section 6 as follows:

"All property, real and personal, of the state, counties and other political subdivisions, and nonprofit cemeteries, shall be exempt from taxation; and all property, real and personal, not held for private or corporate profit and used exclusively for religious worship, for schools and colleges, for purposes purely charitable, or for agricultural and horticultural societies may be exempted from taxation by general law. All laws exempting from taxation property other than the property enumerated in this article, shall be void."

Honorable John Crow

Implementing this constitutional provision is Section 137.100 (5), RSMo Supp. 1967, which provides as exempt from taxation for state, county or local purposes:

"All property, real and personal actually and regularly used exclusively for religious worship, for schools and colleges, or for purposes purely charitable and not held for private or corporate profit, except that the exemption herein granted does not include real property not actually used or occupied for the purpose of the organization but held or used as investment even though the income or rentals received therefrom is used wholly for religious, educational or charitable purposes."

The right to exemption is grounded upon the use made of the property sought to be exempted. We must therefore consider whether the use which merits the exemption is a present use or whether the right of exemption carries with it, as an incident, the opportunity to adapt and fit the property for use within a reasonable time by the construction of a building to be used exclusively for purposes purely charitable.

We note that while the precise question you present has not been directly before the court, the broad question was discussed by the court in relation to taxes assessed on property owned by a charitable corporation that claimed its property was exempt from taxation under Article X, Section 6 of the Constitution and Section 137.100, RSMo Supp. In *Bethesda General Hospital v. State Tax Commission*, 396 S.W.2d 631 (Mo. 1965) the court stated, l.c. 633:

"The issue here is concerned with the words of the Constitution and statute, *supra*, that real property shall be exempt from taxation where it is not held for private or corporate profit, and the same is used exclusively for purposes purely charitable. The rules applicable to cases such as this are that exemption statutes are strictly but reasonably (so as not to curtail the intended scope of the exemption) construed; that the charitable use exemption depends upon the use made of the property and not solely upon the stated purposes of an organization; that each tax exemption case is 'peculiarly one which must be decided upon its own facts'; that taxation is the rule; exemption is the exception; and that claims for exemption are not favored in the law. *Midwest Bible and*

Honorable John Crow

Missionary Institute v. Sestric, 364 Mo. 167,
260 S.W.2d 25. . . ."

The court also pointed out on pages 633-634:

". . . that the reason for state tax exemption provisions is that they are given in return for the performance of functions which benefit the public; 84 C.J.S. Taxation § 281, p. 533; that the exemption in favor of the charitable institutions is based upon the ground that a benefit is conferred upon the public by them, with consequent relief, to some extent, of the burden imposed upon the state to care for and advance the interests of its citizens. 34 A.L.R. 635. See also 51 Am.Jur. Taxation § 600, p. 583."

The public policy underlying concessions of this character is invariably based upon actual use as a presumable quid pro quo for the concession. Moreover, the fundamental rule pervading all exemptions from the general tax burdens of the state is that they are not favored in law, and will not be construed to exist unless the statutes invoked to support them express the legislative intention in clear and unmistakable terms.

The language of the statute is "actually and regularly used exclusively" for purposes purely charitable. Substantially the same language was considered by the Court of Errors and Appeals of New Jersey in Borough of Longport v. Max and Sarah Bamberger Seashore Home, 102 A. 633 (Ct.Err. & App., N.J. 1917) as follows:

"Section 3, subd. 4, Laws 1903, p. 395, as amended by chapter 278 of the Laws of 1913, exempts from taxation all buildings and land owned by charitable institutions actually used for charitable purposes at the time fixed by law for the assessment of taxes.

"The testimony shows that the petitioner acquired title to its land in Longport in the early part of 1914; that buildings were erected thereon and completed before December 31, 1914; that the institution was not actually opened and in use until July 1, 1915.

"The inquiry therefore is as to the construction of the words "actually used for charitable purposes," contained in the act of 1913.

Honorable John Crow

"However we might feel predisposed to favor the claim for exemption in this case, we cannot but be mindful of the fact that our solution of the inquiry is not at all fancy free, but that our judgment must be guided and controlled upon the principle of stare decisis, which brings us inevitably to a denial of the validity of the respondent's claim.

"The act of 1913, under which the tax is laid, and upon the terms of which the exemption must be demanded and supported, is not before us for the first time.

"The case of Holy Angels v. Ft. Lee, 80 N. J. Law, 545, 77 Atl. 1035, settled the construction of the act adverse to the contention of the respondent, and the rule was there laid down that "where a building is in course of erection, intended to be used for a charitable purpose, but not actually used therefor, it is not exempt from taxation.""

The Supreme Court of Missouri has held that a charitable use tax exemption depends upon the use made of the property and not solely on the stated purposes of an organization. St. Louis Gospel Center v. Prose, 280 S.W.2d 827 (Mo. 1955).

It appears, therefore, that in order to be exempt the property must be actually used. In the situation you present, the natural construction of the language forbids the exemption. The doubt suggested as to the taxability of property where preparations were being made before the time of assessment to appropriate and use the property for the charitable purpose is removed by the language of the statute and the words "actually and regularly used exclusively" for the charitable purpose. The most that can be said in this situation is that the property was intended to be used for a charitable purpose. Inasmuch as it was not used for a charitable purpose on January 1, 1970, it is not exempt from taxation for the year 1970.

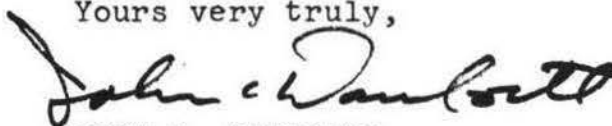
CONCLUSION

It is the opinion of this office that under Article X, Section 6 of the Constitution and Section 137.100, RSMo Supp. 1967, a building in the course of construction intended to be used for charitable purposes but not so used at the time fixed for assessment of taxes is not exempt from taxation.

Honorable John Crow

The foregoing opinion, which I hereby approve, was prepared by my Assistant, L. J. Gardner.

Yours very truly,

A handwritten signature in cursive script, reading "John C. Danforth". The signature is written in dark ink and is positioned above the printed name.

JOHN C. DANFORTH
Attorney General

TAXATION (INTANGIBLE): 1. Time charges in excess of the cash sale price under a retail charge agreement or a retail time contract, which establishes a time sale price as defined in Section 408.250, RSMo 1969, do not constitute "yield" within the meaning of the Intangible Personal Property Tax Law. 2. The full time sale price under a retail charge agreement or a retail time contract, including the cash sale price and the time charge as defined in Section 408.250, RSMo 1969, is subject to the Missouri sales tax provided in Chapter 144, RSMo 1969.

September 25, 1970

OPINION NO. 311

Honorable Charles S. Broomfield
State Representative - 87th District
4801 No. Lister
Kansas City, Missouri 64119



Dear Representative Broomfield:

This official opinion is issued in response to the request contained in your letter concerning the Missouri Intangible Personal Property Tax. More specifically, the question presented is:

"Question--are retail financial charges, carrying charges etc. subject to general intangible tax under Chapter 146?"

The question appears to have been prompted by the fact that many retail department stores are not filing intangible personal property tax returns covering money received from charges made in connection with credit sales of merchandise. A determination of this matter depends upon an interpretation of the provisions of the Intangible Personal Property Tax Law (Chapter 146, RSMo 1969) and the Missouri Retail Credit Sales Law (Sections 408.250 to 408.370, RSMo 1969).

Chapter 146, RSMo, in pertinent part reads as follows:

Section 146.020.

"1. Except as otherwise provided by law, intangible personal property having a taxable situs in the state of Missouri at any time

Honorable Charles S. Broomfield

during the calendar year shall be subject to a property tax for the calendar year following the year in which the property had such taxable situs in this state.

"2. The tax on intangible personal property shall be based on the yield of the property during the preceding calendar year, and the rate of tax shall be four percent of such yield.

"3. Any person whose total tax under the provisions of this section amounts to one dollar or less shall not be required to file a return."

Certain terms used in this section are defined in Section 146.010, as follows:

"1. 'Intangible personal property' means moneys on deposit; bonds, except those which under the constitution or laws of the United States may not be made the subject of a property tax by the state of Missouri; certificates of indebtedness, other than capital notes issued by banks or trust companies; notes, debentures; accounts receivable, conditional sales contracts, which have incorporated therein promises to pay; and real estate and chattel mortgages.

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"4. The terms 'yield' or 'annual yield' mean the aggregate proceeds received as a result of ownership or beneficial interest in intangible property whether received in money, credits or property, exclusive of any return of capital, and less the amount of interest required to be credited by the owner thereof, during the preceding calendar year, to reserve liabilities of the owner maintained under the statutes of this state, and less proceeds set aside or accumulated by the owner thereof under contracts or agreements for pension or retirement or employee benefits."

Basically, the question is whether a person who receives finance charges, carrying charges or similar receipts as a result of credit sales, thereby has a "yield" on intangible personal property within the meaning of the statutes.

Whether or not a yield has been received by reason of such payments will ultimately depend upon the terms of the agreement. At

Honorable Charles S. Broomfield

the present time most retail sales transactions on a deferred payment basis will be made under the terms of (1) a retail charge agreement or (2) a retail time contract. Both of these types of credit agreements are controlled by the Retail Credit Sales Law.

The courts have held that a person selling personal property may establish both a "cash" and a "credit" or "time sale price" for such property. In such cases, where deferred payments are involved, the time sale price is the actual sale price and the transaction does not involve a loan of money or the collection of interest. Wyatt v. Commercial Credit Corp., 341 S.W.2d 348 (Mo.App.1960); General Contract Purchase Corp., v. Propst, 239 S.W.2d 563 (Mo.App.1951); Personal Finance Co. of St. Louis v. Endicott, 238 S.W.2d 51 (Mo.App.1951); Holland-O'Neal Milling Co. v. Rawlings, 268 S.W.683 (Mo.App.1925).

On the basis of the rule set forth in these and other court decisions it is concluded that where the contract between the seller and purchaser of merchandise provides for a "time sale price", the difference between the established cash price and the time sale price does not constitute "yield" within the meaning of the intangible personal property tax law. In other words there is no yield by way of interest or otherwise because the time sale price is the actual sale price and the cash price is disregarded.

Section 408.250(10) defines a retail charge agreement as follows:

"Retail charge agreement" means an agreement entered into in this state between a retail seller and a retail buyer prescribing the terms of retail time transactions to be made from time to time pursuant to such agreement, and which provides for a time charge to be computed on the buyer's total unpaid balance from time to time."

Section 408.240(12) defines a retail time contract as follows:

"Retail time contract" means an agreement evidencing one or more retail time transactions entered into in this state pursuant to which a buyer engages to pay in one or more deferred payments the time sale price of goods or services. The term includes a chattel mortgage; conditional sales contract; and a contract for the bailment or leasing of goods by which the bailee or lessee contracts to pay as compensation for their use a sum substantially equivalent to or in excess of their cash sale price and by which it is agreed that the bailee or lessee is bound to become, or, for no further or a merely nominal consideration has the option of becoming, the owner of the goods upon full compliance with the provisions of the contract."

Honorable Charles S. Broomfield

Both forms of agreement contemplate the use of a "time charge" which term is defined in Section 408.250(15) as follows:

"Time charge" means the amount, however denominated or expressed, in excess of the cash sale price under a retail charge agreement or the principal balance under a retail time contract which a retail buyer contracts to pay or pays for goods or services. It includes the extension to the buyer of the privilege of paying therefor in one or more deferred payments." (Emphasis supplied).

It should be observed that in both retail charge agreements and retail time contracts a "time sale price" is established. By statutory definition in Section 408.250(16) this price is as follows:

"Time sale price" means the total of the cash sale price of the goods or services and the amount, if any, included for insurance and other benefits if a separate identified charge is made therefor, and the amounts of the official fees, and the time charge."

Section 408.300 establishes the amount of time charges which may be made on retail time contracts and retail charge agreements. Subsection 1 relates to time contracts and subsection 2 covers time charge agreements. Both subsections 1 and 2 are effective "Notwithstanding the provisions of any other law . . .".

Thus it is apparent that in all agreements subject to the provisions of the Retail Credit Sales Law a statutory "time charge" is authorized which, when added to the cash price established for retail sales of property, will constitute the "time sale price." Accordingly it is our view that they are governed by the principle of law applicable where a seller and a buyer agree upon a time sale price and the difference between the cash sale price and the time sale price does not constitute yield. See Wyatt v. Commercial Credit Corp., supra.

Section 408.330, RSMo 1969, provides as follows:

"If a retail time contract so provides, the holder thereof may charge and collect: (1) A delinquency and collection charge on each installment in default for a period of not less than ten days in an amount to exceed five percent of each installment or five dollars, whichever is less; provided, however, that a minimum charge of one dollar may be made; or (2) interest on each delinquent payment thereunder at a rate which shall not exceed the highest lawful contract rate. In addition to such delinquency charge, the contract may provide for the payment of

Honorable Charles S. Broomfield

attorney fees not exceeding fifteen percent of the amount due and payable under such contract where such contract is referred for collection to an attorney not a salaried employee of the holder of the contract and for court costs."

Therefore, in the case of retail time contracts where a delinquency is involved the holder of the contract, in addition to other charges, may charge interest at the highest legal rate. These charges, however, would be over and above the time sale price involved in the contract and to the extent that interest is received under this section of the law there would be a yield subject to taxation as provided in the intangible personal property tax law.

Although contracts and agreements of the character to which reference is made above do not involve "yield" (except in the case of delinquency) for the purposes of the Missouri Intangible Personal Property Tax Law, the entire amount of the time sale price would be subject to Missouri sales tax imposed by Chapter 144, RSMo 1969.

In connection with charge and time sales the statute in Section 144.100 states as follows:

" * * *

"3. In case of charge and time sales the amount thereof shall be included as sales in the returns as and when payments are received by the person, without any deduction therefrom whatsoever."

CONCLUSION

It is therefore the opinion of this office that:

1. Time charges in excess of the cash sale price under a retail charge agreement or a retail time contract, which establishes a time sale price as defined in Section 408.250, RSMo 1969, do not constitute "yield" within the meaning of the Intangible Personal Property Tax Law.

2. The full time sale price under a retail charge agreement or a retail time contract, including the cash sale price and the time charge as defined in Section 408.250, RSMo 1969, is subject to the Missouri sales tax provided in Chapter 144, RSMo 1969.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John E. Park.

Very truly yours,



JOHN C. DANFORTH
Attorney General

SCHOOLS:
INSURANCE:

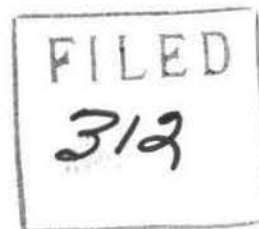
All functions which a school district is authorized to perform are "governmental" functions and the

school district is not liable for its negligence while performing those functions. Therefore, a school district may not expend public funds to purchase liability insurance to protect itself from liability resulting from authorized functions of the district such as allowing its swimming pool and auditorium to be used by non-profit organizations, repairing automobiles through a district's Vocational Technical School, and licensing concessionaires at athletic events.

OPINION NO. 312

November 4, 1970

Honorable John Crow
Prosecuting Attorney
Greene County Court House
Springfield, Missouri 65802



Dear Mr. Crow:

This is in response to your request of April 7, 1970, which reads as follows:

"The attorneys for Reorganized School District R-12, Greene County (Springfield), have asked that I request your opinion in the following matter.

"The School District

"(1) proposes to allow its swimming pool to be used by non-profit organizations provided such organizations pay the expenses of such use;

"(2) furnishes its auditorium to non-profit organizations and collects fees to cover the expenses;

"(3) through the Vocational Technical School repairs cars for the public without charge for labor, but sells the parts at a mark-up;

"(4) licenses concessionaires at athletic events (for consideration received).

"Because of the fact that the activities referred to do involve substantial exposure to liability

Honorable John Crow

the attorneys for the School District would like answers to the following questions:

"Question 1: Are the aforementioned activities 'proprietary functions' such that the School District would not be able to raise the defense of sovereign immunity to a tort action arising out of these activities?

"Question 2: If the answer to Question 1 is in the affirmative, can the School District purchase liability insurance to protect itself?"

Before we answer the specific questions you asked, we must first determine if the school board of a six-director district is authorized to conduct the activities set forth in your letter. We have determined that activities (1) and (2) are authorized by Section 177.031(2), RSMo 1969, which reads as follows:

"2. The school board having charge of the schoolhouses, buildings and grounds appurtenant thereto may allow the free use of the houses, buildings and grounds for the free discussion of public questions or subjects of general public interest, for the meeting of organizations of citizens, and for any other civic, social and educational purpose that will not interfere with the prime purpose to which the houses, buildings and grounds are devoted. If an application is granted and the use of the houses, buildings or grounds is permitted for the purposes aforesaid, the school board may provide, free of charge, heat, light and janitor service therein when necessary, and may make any other provisions, free of charge, needed for the convenient and comfortable use of the houses, buildings and grounds for such purposes, or the school boards may require the expenses to be paid by the organizations or persons who are allowed the use of the houses, buildings and grounds. All persons upon whose application, or at whose request, the use of any schoolhouse, building, or part thereof or any grounds appurtenant thereto, is permitted as herein provided, shall be jointly and severally liable for any injury or damage thereto which directly

Honorable John Crow

results from the use, ordinary wear and tear excepted." [Emphasis added]

The school district is authorized to permit the use of its swimming pool and its auditorium to non-profit organizations for "free discussion of public questions or subjects of general public interest, for the meeting of organizations of citizens and for any other civic, social and educational purpose." The school board may provide these facilities free of charge or may require the user to pay the expenses of providing these facilities.

The fourth activity is specifically authorized by Section 177.121, RSMo 1969, which states:

"The school district may charge and receive reasonable tolls or admission charges and may grant, for consideration and under terms and conditions that the board of directors determines, concessions or exclusive rights to sell in and about the stadium refreshments, programs, emblems and similar articles related to the activity carried on, and the exclusive rights to make radio or television broadcasts of the games, contests or other exhibitions that are held therein; and may permit temporary use of the stadium by others when not in use by the schools, upon terms and for consideration, if any, that the board of directors determines."

With reference to the third activity, Sections 178.420 through 178.580 authorize a school district to have a vocational education program. We believe that the power to repair automobiles for the public without charge for labor could reasonably be inferred from these statutes. We find it unnecessary in this opinion to decide whether a school district can make a charge for parts in excess of the cost of the parts to the district because your question is only as to the district's tort liability and authority to purchase liability insurance.

Having determined that the school district is authorized to conduct these activities, we believe that they are "governmental" functions of the school district. Political subdivisions of the state, which are often called quasi or public corporations, are authorized to perform only "governmental" functions and come under the cloak of sovereign immunity when performing those functions. Municipal corporations, on the other hand, are authorized to perform both "governmental" and "proprietary" functions and their

Honorable John Crow

liability depends on the type of function. This distinction between public corporations and municipal corporations was described by the Missouri Supreme Court in Cullor v. Jackson Township, Putnam County, 249 S.W.2d 393, 395 (Mo. 1952):

" . . . it is important to bear in mind the distinction between municipal corporations (in the strict and proper sense), such as cities, towns and villages, and quasi corporations, such as counties and townships. Municipal corporations exercise both governmental and proprietary (sometimes called corporate) functions. Their liability or non-liability in tort depends on the character of the particular function involved as being governmental on the one hand, or proprietary on the other."

The court held that the defendant was not liable because it was a political subdivision citing the following from Cassidy v. City of St. Joseph, 247 Mo. 197, 206, 152 S.W. 306, 309 (1912):

" . . . 'Neither the State nor these quasi-corporations consisting of political subdivisions which, like counties and townships, are formed for the sole purpose of exercising purely governmental powers, are, in the absence of some express statute to that effect, liable in an action for damages either for the nonexercise of such powers, or for their improper exercise, by those charged with their execution. . . . ' . . . " [Emphasis added]

Because a political subdivision is formed only to perform "governmental" functions, all functions it is authorized to perform must be "governmental" functions.

This idea is so strongly entrenched that the courts only discuss "proprietary" versus "governmental" functions when a municipal corporation is involved. For example, see Todd v. Curators of University of Missouri, 347 Mo. 460, 147 S.W.2d 1063 (1941) where the court held a political subdivision was not liable in suits for negligence arising out of the performance of a governmental function. The court did not go on to discuss the possible result if the political subdivision was performing a "proprietary" function apparently assuming that whatever a political subdivision does is a "governmental" function. In fact, in the most recent case on the liability of a school district for negligence, Smith v. Consolidated School Dist. No. 2, 408 S.W.2d 50, 54 (Mo. en banc 1966), the court merely said:

Honorable John Crow

" . . . For more than a century the courts of Missouri have uniformly held generally that political subdivisions of the state are not subject to liability in suits for negligence. [citations omitted] School districts are political subdivisions of the state. Art. 10, § 15, Constitution of Missouri, V.A.M.S., § 70.210, RSMo 1959, V.A.M.S. As such, school districts have long been held immune from liability in tort for negligence. . . ."

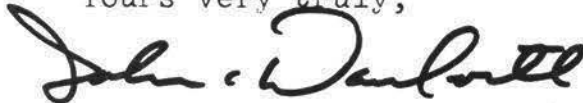
The court in the Smith decision dropped the "in performance of a governmental function" qualification used by the earlier courts and appears to have given school districts a blanket immunity against negligence. This might be overstating the rule because the court was discussing a request to abolish the doctrine of sovereign immunity, however, it supports our conclusion that school districts are immune from liability for negligence when performing functions which are authorized by statute.

CONCLUSION

All functions which a school district is authorized to perform are "governmental" functions and the school district is not liable for its negligence while performing those functions. Therefore, a school district may not expend public funds to purchase liability insurance to protect itself from liability resulting from authorized functions of the district such as allowing its swimming pool and auditorium to be used by non-profit organizations, repairing automobiles through a district's Vocational Technical School, and licensing concessionaires at athletic events.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, D. Brook Bartlett.

Yours very truly,



JOHN C. DANFORTH
Attorney General

AIR POLLUTION:
AIR CONSERVATION:

The Missouri Air Conservation Commission has the authority to grant variances from the provisions of Regulation X, Section B, Paragraph 1, of the "Air Quality Standards and Air Pollution Control Regulations for the St. Louis Metropolitan Area."

OPINION NO. 313

June 3, 1970

Honorable H. D. Shell
Acting Executive Secretary
Missouri Air Conservation Commission
112 West High Street
Jefferson City, Missouri 65101



Dear Mr. Shell:

This is in answer to your request for an official opinion of this office concerning the question whether the Missouri Air Conservation Commission has the authority to grant a variance from the provisions of Regulation X, Section B, Paragraph 1, of the "Air Quality Standards and Air Pollution Control Regulations for the St. Louis Metropolitan Area." As stated in your letter this opinion request was prompted by an opinion of the St. Louis County Counselor's office, dated April 15, 1970, holding that the St. Louis Air Pollution Appeals Board is without authority to grant a variance from an identical county regulation. Since St. Louis County adopted verbatim the State standards and regulations, such interpretation throws into doubt the authority of the State Commission to grant a variance.

The "Missouri Air Conservation Law", Chapter 203, RSMo, enacted in 1965, created the Air Conservation Commission (Section 203.040, RSMo Supp. 1967), and gave the Commission the power to establish areas of the State, designate air quality standards for such areas, adopt emission control regulations, and adopt any rules and regulations consistent with the general intent and purposes of Chapter 203 (Section 203.050, RSMo Supp. 1967).

Accordingly, the Commission did, pursuant to Section 203.070, RSMo Supp. 1967, designate the St. Louis Area, which includes St. Louis, St. Louis County, St. Charles County and Jefferson County,

Honorable H. D. Shell

and did adopt standards, rules and regulations for that area, part of which are in question here.

Regulation X, Section B, Paragraph 1, of which you inquire, reads as follows:

"After three (3) years from effective date of this regulation, no persons shall cause or permit the emission of sulfur dioxide to the atmosphere from any fuel burning installation with a capacity of 2,000 million or more British Thermal Units per hour in an amount greater than 2.3 pounds of sulfur dioxide per million British Thermal Units of heat input to the installation."

Since the effective date of the regulation was March 24, 1967, this prohibition became effective March 24, 1970.

The question is whether the Commission has the authority to grant a variance now from this regulation.

In answering this question consideration must also be given to Regulation XXIV which states the general time schedule for compliance of the St. Louis area regulations, reading as follows:

"Except as otherwise specified, compliance with the provisions of these regulations shall be according to the following time schedule:

A. All new installations shall comply as of going into operation.

B. All existing installations not in compliance as of the effective date shall be in compliance within six months of the effective date unless the owner or person responsible for the operation of the installation shall have submitted to the Executive Secretary in a form and manner satisfactory to him, a program and schedule for achieving compliance, such program and schedule to contain a date on or before which full compliance will be attained, and such other information as the Executive Secretary may require. If approved by the Executive Secretary, such date will be the date on which the person shall comply.

"The Executive Secretary may require persons submitting such program to submit subsequent periodic reports on progress in achieving compliance."

Honorable H. D. Shell

In our opinion neither one of these regulations constitutes a variance and do not preclude the Commission from granting a variance under Section 203.110, RSMo Supp. 1967. Both the time schedules in Regulation X and in Regulation XXIV are not variances but are merely statements when particular regulations are to become enforceable. This is permissible under Section 203.070.4, RSMo Supp. 1967, which states:

"Any standard, rule or regulation or any amendment thereof which is adopted by the commission may differ in its terms and provisions as between particular types and conditions of air pollution or of air contamination, as between particular air contaminant sources, and as between particular areas of the state."

If Regulation X constituted a variance, then it would logically follow that Regulation XXIV was also a variance and the Commission would be precluded from granting variances in any instance.

The definition of variance in Webster's Third New International Dictionary, which applies here, is as follows:

" * * * b: a permission or license to do some act contrary to the usual rule and used esp. of grants of permission or authorizations to build contrary to the provisions of an otherwise applicable zoning ordinance or building code * * * "

The effective date of the prohibition in Regulation X, Section B, Paragraph 1, is three years from March 24, 1967, and for most other regulations is September 24, 1967. A variance is an exception contrary to these requirements or prohibitions in such regulations. Therefore, as stated above, it is our opinion that Regulation X, Section B, Paragraph 1, is not a variance. The intent of the regulation was not to preclude the granting of a variance from Regulation X by the Commission.

Furthermore, it is our opinion that the Commission, even if it attempted to do so, could not preclude by regulation the granting of variances because of the specific language of Section 203.110 which reads in part as follows:

"1. The commission may grant individual variances beyond the limitations prescribed in this chapter whenever it is found, upon presentation of adequate proof, that compliance with any provision of this chapter or any rule or regulation, standard, requirement, or order of the commission or executive secretary will result in an arbitrary and unreasonable taking of property or in the

Honorable H. D. Shell

practical closing and elimination of any lawful business, occupation or activity, in either case without sufficient corresponding benefit or advantage to the people; except, that no variance shall be granted where the effect of the variance will permit the continuance of a health hazard; and except, also, that any variance so granted shall not be so construed as to relieve the person who receives the variances from any liability imposed by other law for the commission or maintenance of a nuisance."

This law authorizes the Commission to grant "individual" variances from "any" rule or regulation. We do not think that the Commission could, by regulation, take away the right to the variance procedure authorized by statute.

CONCLUSION

It is the opinion of this office that the Missouri Air Conservation Commission has the authority to grant variances from the provisions of Regulation X, Section B, Paragraph 1, of the "Air Quality Standards and Air Pollution Control Regulations for the St. Louis Metropolitan Area."

The foregoing opinion, which I hereby approve, was prepared by my assistant, Walter W. Nowotny, Jr.

Very truly yours,



JOHN C. DANFORTH
Attorney General

June 12, 1970

Answered by Mansur
OPINION LETTER NO. 315



Honorable James L. Paul
Prosecuting Attorney
McDonald County Court House
Pineville, Missouri 64856

Dear Mr. Paul:

This is in response to your request for an opinion from this office as follows:

"(1) Does the County Clerk in his selection of Judges and Clerks have to select equally from the two major parties, the Judges and Clerks to serve at said election, from the list submitted by the Chairman of each party?

"(2) Who is the proper official to deliver the ballots to the various voting precincts, and who designates the 'messenger' to bring the ballots to the County Clerk following the close of the polls and the tabulation in the various precincts?

"(3) Is the Sheriff required to appoint a Deputy to serve at each polling place, and if so, is the Deputy also the 'mes-

Honorable James L. Paul

senger' in returning the results of the election to the County Clerk?"

McDonald County is a third class county.

Section 120.610, RSMo 1959, provides that judges and clerks of primary elections shall be appointed in the same manner and in the same number and shall possess the same qualifications as judges and clerks of the general elections in this state.

In reply to the first question you submit, we enclose herewith Opinion No. 403 issued on October 17, 1968, by this office. Also, Opinion No. 12 issued on July 25, 1936. We believe these opinions answer the first question you submitted.

In answer to your second question as to who is to deliver the ballots to the various voting precincts, Section 111.421, Senate Bill 134, Seventy-fifth General Assembly provides that the county clerks or board of election commissioners shall have ballots and election supplies delivered to the election judges by the sheriff or by a messenger and reasonable compensation shall be allowed for his services to be paid as other election expenses.

We are enclosing herewith Opinion No. 136 issued by this office on February 3, 1970, which holds that sheriffs in third and fourth class counties are required to pay fees collected by them in civil matters, except mileage, into the county treasury but such sheriffs are not to collect fees for services where such charges are payable out of the county treasury.

In answer to your question as to who designates the messenger to bring the ballots to the county clerk's office following the close of the polls on election day, Section 111.211, Senate Bill 134, Seventy-fifth General Assembly, requires the supervisory judges designated by the County Court as provided in Section 111.181 Senate Bill 134, Seventy-fifth General Assembly to return the ballots, poll books and other required materials to the office of the county clerk.

We enclose herewith Opinion No. 327 issued by this office on August 1, 1968, which we believe answers the third question you have submitted.

Honorable James L. Paul

If you have any further questions, please advise.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosures:

Opinion No. 403,
10-17-68, Shrum

Opinion No. 12,
7-25-36, Brown

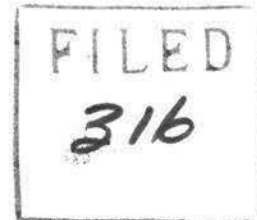
Opinion No. 136,
2-3-70, Holman

Opinion No. 327,
8-1-68, Kaderly

May 15, 1970

OPINION LETTER NO. 316

Honorable Kenneth J. Rothman
State Representative
130 South Bemiston Avenue
Clayton, Missouri 63105



Dear Representative Rothman:

This letter is in response to your question concerning whether a person who served as a police officer in a municipal police department in St. Louis County prior to October 13, 1963, must meet the training requirements prescribed by Section 66.250, RSMo Supp. 1967, if he leaves such employment and is hired as a police officer in another such city.

Section 66.250 states:

"1. Any person hired after October 13, 1963, to serve as a police officer in a municipal police department in any county of the first class having a charter form of government shall, within six months after beginning such employment, satisfactorily complete a law enforcement officer training course conducted by the county police department or the state highway patrol or any accredited college course for police officers.

"2. Any person required by this section to complete a training course who fails to do so within the six months' period shall not thereafter receive any compensation nor shall he be authorized to act as a police officer until he has satisfactorily completed the course."

This statute was enacted as House Bill 578 in 1963 by the 72nd General Assembly. The bill was changed very little during

Honorable Kenneth J. Rothman

its course of passage.

Although we find no precedent to aid us in answering your question, it is our view that if the police officer terminates such employment and is hired to serve as a police officer in any municipality within the county, including new employment with the municipality with which he served as police officer on October 13, 1963, the provisions of the statute require that he as a "person hired after October 13, 1963," complete the prescribed training course.

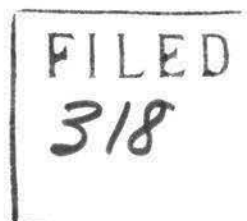
Yours very truly,

JOHN C. DANFORTH
Attorney General

Answer by Letter (Klaffenbach)

December 1, 1970

OPINION LETTER NO. 318



Honorable Clarence W. Hawk
Assistant Prosecuting Attorney
Moniteau County Court House
California, Missouri 65018

Dear Mr. Hawk:

This letter is in answer to your inquiry concerning an interpretation of Section 56.240, RSMo 1969, with respect to the appointment, qualification and duties of the prosecuting attorneys in third and fourth class counties. Specifically you inquire whether the Court or any other parties can challenge the appearance of the assistant prosecuting attorney in the trial of a case in which the State is involved on the grounds that the prosecuting attorney is not out of the county, sick, or trying another case. Section 56.240 to which you refer states in part as follows:

"The prosecuting attorney in counties of the third and fourth classes may appoint one assistant prosecuting attorney who shall possess all the qualifications of a prosecuting attorney and be subject to all the liabilities and penalties for failure or neglect to discharge his duty to which prosecuting attorneys are liable. . . . The assistant prosecuting attorney shall discharge the duties of the prosecuting attorney when the prosecuting attorney is sick or absent from the county, or when the prosecuting attorney is engaged in the

Honorable Clarence W. Hawk

discharge of the duties of his office so that he cannot attend. In counties of the third class the assistant prosecuting attorney shall assist the prosecuting attorney in any case when requested to do so by the prosecuting attorney, but the former shall be disqualified from defending in any criminal case. . . ." (Emphasis added)

The first sentence that we have underscored applies to both third and fourth class counties. The second sentence that we have in part underscored applies only to third class counties and in our view indicates that the legislature intended that the assistant prosecuting attorney of such counties shall assist the prosecuting attorney in any case when requested to do so by the prosecuting attorney regardless of whether or not the prosecuting attorney is sick or absent from the county or engaged in the discharge of the duties of his office so that he cannot attend. Any other interpretation would render meaningless the provision applicable to third class counties which we have emphasized.

While it might also be contended that the prosecuting attorney must be in attendance at every case in which the assistant prosecuting attorney "shall assist the prosecuting attorney" we believe that such would be an unreasonable construction and not a correct reflection of the legislative intent. The prosecuting attorney is of course charged with the duty of commencing and prosecuting all civil and criminal actions in his county in which the county or the state is concerned. Section 56.060, RSMo 1969. However, the provisions of that section by no means abrogate the well established rule that a deputy, or in this case the assistant prosecuting attorney, when acting as such has authority which is presumably commensurate with that of the prosecuting attorney. State v. Carey, 1 S.W.2d 143, 318 Mo. 813 (1927).

We also understand that the question has been raised concerning whether the assignment of the assistant prosecuting attorney by the prosecuting attorney to try any case is open to collateral question or attack by the court or third parties. In this respect we must bear in mind that the prosecuting attorney is an officer and the assistant prosecuting attorney is, in the exercise of his duties, also an officer and attendant to their official status is the presumption of legality and validity of their acts. In our view when the prosecuting attorney of a third class county requests the assistance of his duly appointed assist-

Honorable Clarence W. Hawk

ant prosecuting attorney to handle any case within his jurisdiction such a determination is the exercise of an act of discretion and such discretion is solely within his jurisdiction. Official acts of this nature cannot be impeached collaterally. Harvaugh v. Winsor, 38 Mo. 327 (1886). Note also the statement of the Supreme Court of Missouri in State v. Carey, 1 S.W.2d 143, 145:

"In affirming the ruling in the Hynes Case, supra, the Kansas City Court of Appeals in Browne's Appeal, 69 Mo. App. 159, said:

"The existence of the conditions under which the assistant prosecuting attorney may act must be left to the decision of the prosecuting officer' and 'cannot be raised in * * * a collateral action.'"

The views that we have expressed in relation to these questions also finds support in the case of State ex rel. Griffin v. Smith, 258 S.W.2d 590, 363 Mo. 1235 (Mo. banc 1953), in which the Court stated l.c. 593:

"When the law, in terms or impliedly, commits and entrusts to a public officer the affirmative duty of looking into facts, reaching conclusions therefrom and acting thereon, not in a way specifically directed, [i.e., not merely ministerially] but acting as the result of the exercise of an official and personal discretion vested by law in such officer and uncontrolled by the judgment or conscience of any other person, such function is clearly quasi judicial. This court has written much upon the broad discretion vested in a public prosecutor. State on Inf. of McKittrick v. Wymore, supra; State on Inf. of McKittrick v. Wallach, 353 Mo. 312, 182 S.W.2d 313, 318, 319. In this jurisdiction it is recognized that this public office is one of consequence and responsibility. The status of the prosecuting attorney as a public officer is given dignity and importance by our statutes. Sections 56.010 to 56.620, RSMo 1949, V.A.M.S. With every other attorney at law a prosecuting attorney is, of course, an officer of the court in a larger sense; but he is not a mere lackey

Honorable Clarence W. Hawk

of the court nor are his conclusions in the discharge of his official duties and responsibilities, in anywise subservient to the views of the judge as to the handling of the State's cases. A public prosecutor is a responsible officer chosen for his office by the suffrage of the people. He is accountable to the law, and to the people. He is 'vested with personal discretion intrusted to him as a minister of justice, and not as a mere legal attorney.
. . . "

Very truly yours,

JOHN C. DANFORTH
Attorney General

ROADS AND BRIDGES:
SPECIAL ROAD DISTRICTS:

(1) County Aid Road Trust Funds derived from motor fuel taxes may be expended by a county court on roads located in a special road district. (2) Such funds may not be expended by the county court on bridges located in a special road district. (3) A county court cannot be compelled to spend such funds in a special road district.

OPINION NO. 320

August 21, 1970

Honorable Marvin E. Proffer
State Representative
District No. 156
P. O. Box 191
Jackson, Missouri 63755



Dear Representative Proffer:

This letter is in response to your request for an opinion as follows:

"This letter is in relation to an opinion from your office for use of Highway Cart Funds within counties for special road districts. Mr. A. W. Phegley, President of the Chaffee Chamber of Commerce, asked me to get an Attorney General's Opinion to see (1) if cart funds can be used for special road district projects and (2), if the County Court refuses to use any can they be instructed to do so."

We assume the "cart funds" to which you refer is the allotment of the motor fuel tax which is required to be deposited in a trust fund known as the "County Aid Road Trust Fund" as provided for under Article IV, Section 30(a), subdivision 1, of the Constitution of Missouri.

Article IV, Section 30(a), Constitution of Missouri, provides for a tax on motor vehicle fuel. This tax money, after deducting certain costs, "shall be apportioned between the counties, cities and the state." Subdivision (1) of subsection 1 provides for the portion going to the counties and reads in part as follows:

" . . . The funds credited to each county shall be used by the county solely for the construction, reconstruction, maintenance and repairs

Honorable Marvin E. Proffer

of roads, bridges and highways, and subject to such other provisions and restrictions as provided by law. In the absence of other controls provided by law, the state highway commission shall prescribe policy, rules and requirement for the expenditure of these funds by counties, including, among other things, highway commission approval of plans for projects on which the funds are to be used. In counties having the township form of county organization, the funds credited to such counties shall be expended solely under the control and supervision of the County Court, and shall not be expended by the various townships located within such counties. 'Rural land' as used in this section shall mean all land located within any county, except land in incorporated villages, towns, or cities." (Emphasis supplied)

Article IV, Section 30(a) (supra) provides that five percent of the net proceeds shall be deposited in a special trust fund which shall be credited to the various counties according to the formula contained therein. The funds credited to the county shall be used as set out in this section. In counties with township organization, the funds shall be expended solely under the control and supervision of the county court. It is our view that when the money is paid over to the county, it then becomes "county money" subject to expenditures limited by Section 30(a) of Article IV. If this is true, as we believe, then the expenditure of these funds becomes subject to the provisions of "The County Budget Law" (Section 50.525, RSMo 1969, et seq) regardless of the source from which it is derived (Sections 50.525, and 50.527, RSMo 1969).

Subsection (1) of Article IV, Section 30(a) provides that the funds shall be credited to each county for certain purposes and "subject to such other provisions and restrictions as provided by law." It is our view that Section 50.550, RSMo 1969, provides such restrictions. Section 50.550 reads as follows:

"The annual budget shall present a complete financial plan for the ensuing budget year. It shall set forth all proposed expenditures for the administration, operation and maintenance of all offices, departments, commissions, courts and institutions; the actual or estimated operating deficits or surpluses from prior years; all interest and debt redemption charges during the year and expenditures for capital projects.

Honorable Marvin E. Proffer

The budget shall contain adequate provisions for the expenditures necessary for the care of insane pauper patients in state hospitals, for the cost of holding elections and for the costs of holding circuit court in the county that are chargeable against the county, for the repair and upkeep of bridges other than on state highways and not in any special road district, and for the salaries, office expenses and deputy and clerical hire of all county officers and agencies. In addition, the budget shall set forth in detail the anticipated income and other means of financing the proposed expenditures. All receipts of the county for operation and maintenance shall be credited to the general fund, and all expenditures for these purposes shall be charged to this fund; except, that receipts from the special tax levy for roads and bridges shall be kept in a special fund and expenditures for roads and bridges may be charged to the special fund. All receipts from the sale of bonds for any purpose shall be credited to the bond fund created for the purpose, and all expenditures for this purpose shall be charged to the fund. All receipts for the retirement of any bond issue shall be credited to a retirement fund for the issue, and all payments to retire the issue shall be charged to the fund. All receipts for interest on outstanding bonds and all premiums and accrued interest on bonds sold shall be credited to the interest fund, and all payments of interest on the bonds shall be charged to the interest fund. The county court may create other funds as are necessary from time to time." (Emphasis supplied)

The section, supra, contains the following:

" . . . The budget shall contain adequate provisions for . . . the repair and upkeep of bridges other than on state highways and not in any special road districts, . . . "

Thus, we conclude that the "cart funds" can be utilized for the repair and upkeep of bridges except bridges in special road districts. There is no other limitation on the use of the "cart funds" except that such funds must be used for the constitutionally authorized purposes (supra).

Honorable Marvin E. Proffer

Our search of the laws of Missouri has revealed no other statutes expressly directing where or how the counties' portion of the money is to be expended. Therefore, the money appropriated to the counties shall be expended by the counties according to the Rules and Regulations of the State Highway Commission, under the control and supervision of the county court as provided in the above constitutional provision, and the laws governing the expenditure of ordinary revenue on roads and bridges. Section 2 of the Rules and Regulations of the State Highway Department reads as follows:

"All money in the County Aid Road Trust Fund shall be expended for the construction, reconstruction, repair, and maintenance of roads and bridges in the County Road System as hereinafter provided."

Subsection (b) of Section 3 of the Rules and Regulations defines County Road System as:

". . . all public roads or highways in the county not under the jurisdiction or control of the State Highway Commission or any city, town, or village with a population of more than 200 persons according to the last official census."

Under these Regulations, "cart funds" may be used for the construction, reconstruction, repair and maintenance of all roads in the county except roads not under the jurisdiction and control of the State Highway Commission and any incorporated city, town or village with a population of more than 200 persons.

It is our opinion that under our Constitution and the Rules and Regulations of the State Highway Department "cart funds" may be used on roads in a special road district.

We note that Section 233.115, RSMo 1969, authorizes the county court to construct or repair bridges or appropriate money to aid commissioners of an "eight mile" special road district to repair bridges utilizing funds "available" to it [the county court] for that purpose. It is our view that this limitation means funds that are legally "available" to be used in the road district. It is our view that "cart funds" are not legally "available" for use on bridges in "eight mile" special road districts notwithstanding the provisions of Section 233.115, supra, because of the prohibition in Section 50.550 of expenditures for bridges in special road districts.

We assume from your second question you want to know whether a county court can be forced or compelled to use some of the cart funds in a special road district if they refuse to do so.

Honorable Marvin E. Proffer

We answer your second question in the negative. The expenditure of the cart funds rests in the discretion of the county court and such court cannot be compelled to act in any specific manner by mandamus (State ex rel. Burke v. Ross, 420 S.W.2d 365 (Spr.Ct. App. 1967)) or other legal action.

CONCLUSION

It is the opinion of this office that:

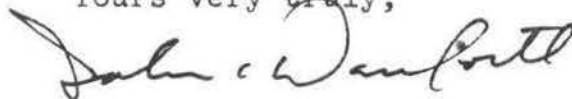
(1) County Aid Road Trust Funds derived from motor fuel taxes may be expended by a county court on roads located in a special road district.

(2) Such funds may not be expended by the county court on bridges located in a special road district.

(3) A county court cannot be compelled to spend such funds in a special road district.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Richard C. Ashby.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Answer by Letter (Craft)

October 5, 1970

OPINION LETTER NO. 321

Honorable Don W. Kennedy
Representative, District 112
127 West Austin Boulevard
Nevada, Missouri 64772



Dear Mr. Kennedy:

Your opinion request was sufficiently concise as to warrant repeating your letter in full:

"Do you have an opinion on the question whether a six director school district of the State of Missouri can invest school district funds in a savings and loan association chartered by the State of Kansas and doing business only in Kansas?"

"It appears to me from Section 369.325 RSMo 1959 that a savings and loan association would have to be doing business in Missouri in order to be qualified as a depository of public funds."

Our holding in this opinion is also governed by our opinion, issued simultaneously herewith, discussing the constitutionality of Section 369.325, RSMo 1969 (3), which permits municipalities or political subdivisions of the State of Missouri to invest in savings and loan institutions. I enclose a copy of Opinion No. 148, 1970, addressed to the Honorable Zane White, which resolves this question.

Honorable Don W. Kennedy

With regard to the specific question that you ask, it is my opinion that this section permits a legal investment only in savings and loan associations which are doing business in Missouri.

Section 369.325, RSMo 1969, provides, in part, as follows:

"1. Accounts of any association doing business in Missouri, whether chartered by the state of Missouri or another state or the United States of America, and which holds certificate of insurance from the Federal Savings and Loan Insurance Corporation:

* * *

"(3) Shall be legal investments for funds of any municipality or political subdivision of the state of Missouri; . . ."

An association which is not doing business in Missouri would obviously not qualify as a depository of funds in those circumstances.

Therefore, a school district of the State of Missouri may not invest its public funds in a savings and loan association chartered by the State of Kansas which is not doing business in the State of Missouri.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure

Opinion No. 148,
1970, White

MOTOR VEHICLES: A person, resident or nonresident, whose
DRIVERS' LICENSES: Missouri operator's license has been revoked
by reason of accumulation of points as pro-
vided by Section 302.304(3), RSMo 1969, cannot legally operate a
motor vehicle in the State of Missouri under a license issued by
another state.

OPINION NO. 322

August 31, 1970

Honorable James L. Paul
Prosecuting Attorney
McDonald County Courthouse
Pineville, Missouri 64856



Dear Mr. Paul:

This official opinion is issued in response to the request contained in your letter concerning the Missouri driver's license law.

The question presented is as follows:

"Where a man has current drivers license in two different States, and his Missouri license are (sic) revoked by reason of points, does that automatically revoke the license in the other State."

The request does not state whether the person involved is a Missouri resident. Assuming the person is a Missouri resident, he can legally operate a motor vehicle in Missouri only if he possesses a valid operator's license issued in this state, Section 302.020, RSMo 1969. When his Missouri license is revoked for point accumulation pursuant to Section 302.304(3), RSMo 1969, the person may not drive a motor vehicle in Missouri even though he may possess a valid license issued by another state.

If the person involved is a nonresident, he is not required to obtain a Missouri license in order to drive in this state if he is authorized to operate a motor vehicle in his home state and otherwise complies with the provisions of Section 302.080, RSMo 1969. Section 302.080 expressly exempts nonresidents from the requirements of Section 302.020 under certain conditions. However, the driving privilege of a nonresident may be suspended or revoked pursuant to

Honorable James L. Paul

Section 302.150(1), RSMo 1969, which provides as follows:

"1. The privilege of driving a motor vehicle on the highways of this state given to a non-resident hereunder shall be subject to suspension or revocation by the director of revenue in like manner and for like cause as an operator's, registered operator's or chauffeur's license issued hereunder may be suspended or revoked."

When this section is considered in conjunction with Section 302.304(3), RSMo 1969, which provides that the director of revenue shall revoke the operating privileges of any person who has accumulated a certain number of points within certain periods of time, it is apparent that driving privileges in Missouri of both residents and nonresidents are subject to revocation for point accumulation regardless of the source of the operator's permit.

Accordingly, it is our opinion that when a person's Missouri operator's license is revoked for points pursuant to Section 302.304, he may not legally drive a motor vehicle in Missouri under a license issued by another state.


The effect of suspension or revocation in Missouri upon driving privileges in other states depends upon the laws of the particular state or states involved. The Missouri statutes, of course, cannot control this situation and the Attorney General's Office is not authorized to issue an opinion on the matter.

CONCLUSION

Therefore, it is the opinion of this office that a person, resident or nonresident, whose Missouri operator's license has been revoked by reason of accumulation of points as provided by Section 302.304(3), RSMo 1969, cannot legally operate a motor vehicle in the State of Missouri under a license issued by another state.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John E. Park.

Yours very truly,



JOHN C. DANFORTH
Attorney General

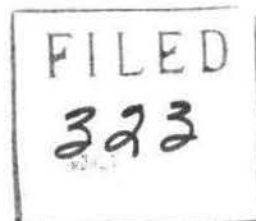
CITY COLLECTOR:
CITY ASSESSOR:

When the office of city assessor and city collector are both elective offices under the ordinances of a city of the fourth class the duties of the office of city assessor are not repugnant or incompatible with those of the city collector and one person may hold both offices at the same time.

OPINION NO. 323

July 22, 1970

Honorable Harold W. Barrick
Prosecuting Attorney
Ralls County
P. O. Box 278
New London, Missouri



Dear Mr. Barrick:

This is in response to your request for an official opinion on the question which you submitted as follows:

"Where the offices of city assessor and city collector are both elective offices under the ordinances of a city of the fourth class, can one person hold both the office of city assessor and city collector at the same time?"

In general it may be said that one person may hold several public offices at the same time unless prohibited by a specific statute, constitutional provision or the common law rule against holding two offices simultaneously when such offices are incompatible.

We know of no specific statute or constitutional provision that would prohibit the simultaneous holding of offices of assessor and collector of a fourth class city and therefore must turn to the common law rule to determine the question.

The common law rule was stated in the case of *State ex rel. Walker v. Bus*, 135 Mo. 325, 36 S.W. 636, 639-640 (1896) as follows:

". . . At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in the physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two, --some conflict in the duties required of the officers, as where one has some supervision of the others, is required to deal with, control,

Honorable Harold W. Barrick

or assist him. It was said by Judge Folger (People v. Green, 58 N. Y. 295): 'Where one office is not subordinate to the other, nor the relations of the one to the other such as are inconsistent and repugnant, there is not that "incompatibility" from which the law declares that the acceptance of the one is the vacation of the other. The force of the word in its application to this matter is that, from the nature and relations to each other of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one towards the incumbent of the other. Thus, a man may not be landlord and tenant of the same premises. He may be landlord of one farm, and tenant of another, though he may not at the same hour be able to do the duty of each relation. The offices must subordinate, one the other, and they must per se have the right to interfere, one with the other, before they are incompatible at common law.' . . ."

In order to apply the foregoing rule, we must examine the statutes relating to the duties of the two offices in question to determine whether there is such an inconsistency in the functions of the offices as to render them incompatible. The principal duties of the assessor are set forth in Section 94.190, RSMo, which provides in paragraph 1:

"In cities of the fourth class, the city assessor, jointly with the county assessor, shall assess all real and personal property in the city, and the assessment so made, after being passed upon by the board of equalization, shall be the basis upon which the board of aldermen shall make the levy for city purposes."

The principal duties of the collector are set forth in Section 95.360, RSMo, as follows:

"It shall be the duty of the city collector to pay into the treasury, monthly, all moneys received by him from all sources which may be levied by law or ordinance; also, all licenses of every description authorized by law to be collected, and all moneys belonging to the city which may come into his hands. He shall give such bond and perform such duties as may be required of him by ordinance."

Honorable Harold W. Barrick

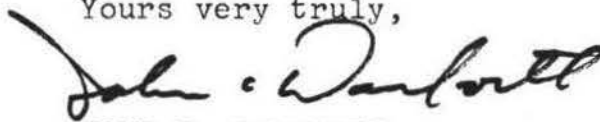
We believe that the foregoing statutory provisions relating to the principal duties of the office of assessor and the office of collector in fourth class cities are sufficient to show that no incompatibility exists between said offices. The duties and functions of one office are not inherently inconsistent or repugnant to the other. Neither office is superior to the other nor does one office have supervision over the other. Therefore, the common law rule of incompatibility is not violated by one person discharging the duties of the two offices.

CONCLUSION

It is the opinion of this office that when the office of city assessor and city collector are both elective offices under the ordinances of a city of the fourth class the duties of the office of city assessor are not repugnant or incompatible with those of the city collector and one person may hold both offices at the same time.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, L. J. Gardner.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

REAL ESTATE BROKER:
REAL ESTATE COMMISSION:
LICENSES:
CRIMINAL LAW:

The offering of free radios or free dinners by a licensed real estate broker in order to induce the public to attend a meeting at which said broker solicits or offers for sale real property in a development within or outside the State of Missouri constitutes soliciting or offering to sell real property by offering prizes for the purpose of influencing a purchaser or prospective purchaser of real property is in violation of Section 339.100(11), RSMo 1969.

OPINION NO. 326

September 28, 1970

Mr. Robert T. Leonard, Chairman
Missouri Real Estate Commission
1707 College Street
Springfield, Missouri 65806



Dear Mr. Leonard:

This official opinion is issued in response to your request concerning the following questions:

"The Missouri Real Estate Commission requests an opinion from the Attorney General's Office as to whether or not the offering of a free radio or the holding of free dinners, by a licensed real estate broker, in order to induce people to come into their offices or to attend their dinners, for the purpose of viewing or listening to land presentations with the possible result of the individual who received the free radio or the free dinner, purchasing land in a development within or outside the State of Missouri is a violation of Section 339.100(11), RSMo 1969."

Section 339.100(11), RSMo 1969, provides that:

"The commission may upon its own motion, and shall upon written complaint filed by

Mr. Robert T. Leonard

any person, investigate the business transactions of any real estate broker or real estate salesman and shall have the power to suspend or revoke any license obtained by false or fraudulent representation or if the licensee is performing or attempting to perform any of the following acts or is deemed to be guilty of:

* * *

"(11) Soliciting, selling, or offering for sale real property by offering free lots, or conducting lotteries, or contests, or offering prizes for the purpose of influencing a purchaser or prospective purchaser of real property."

Section 339.100(11) prescribes the solicitation, selling, or offering for sale of real property in three distinct circumstances; namely, by offering free lots, by conducting lotteries, or contests, or by offering prizes for the purpose of influencing a purchaser or prospective purchaser of real property. The plan referred to in your question obviously does not constitute a violation of Section 339.100(11) by the first means, offering free lots, nor does it constitute a lottery or contest for the reason that the element of chance is not involved. State ex inf. McKittrick v. Globe-Democrat Pub. Co., 341 Mo. 862, 110 S.W.2d 705 (1937).

However, the factual situation presented in your question would constitute a violation of Section 339.100(11) by the third means, offering of prizes, if the offering of free dinners and free radios constitutes the offering of a "prize". The issue presented therefore is the meaning of the word "prize" as used in the context of Section 339.100(11).

A prize is an essential element of a lottery, State ex inf. McKittrick v. Globe-Democrat Pub. Co., supra. Thus, the various lottery cases provide one definition of the word prize.

The court in Equitable, Loan & Security Co. v. Waring, 44 S.E. 320, 326 (Ga. 1903), stated that:

"... As used in connection with anti-lottery laws, the word 'prize' comprehends anything of value gained (or, correspondingly, lost) by the operation of chance, or any inequality in amount

Mr. Robert T. Leonard

or value in a scheme of payment of money
or other thing of value as a result of
the use of chance. The gain need not
be large to constitute a prize. . . ."
(Emphasis added)

In Great Atlantic & Pac. Tea Co. v. Cook, 15 Ohio Misc. 181,
240 N.E.2d 114, 118 (1968), the following definition of "prize" was
given:

" . . . prize is some advantage or inequality
in amount or value, accruing to some, but
not all, of the participants in the game
or contest. No lottery exists if every
contestant receives something of value of
precisely the same nature. . . Ordinarily,
no element of chance exists if there is
equality of distribution. Chance is a
condition precedent to the existence of a
prize. . . ." (Emphasis added)

As the emphasized words indicate, the above definitions relate to
the context of a lottery or contest. As can be seen, when used in
this context the word "prize" denotes the value that may be won by
the operation of chance. Inasmuch as prize and chance are both es-
sential elements of a lottery or contest, it is natural that chance
weigh heavily in the lottery definition of prize. However, when
not used in the context of a lottery the word "prize" has a broader
and more general meaning, devoid of any connotation of chance.

For example, the Missouri Supreme Court defined prize in
Milgram Food Stores, Inc. v. Ketchum, 384 S.W.2d 510, cert. denied,
382 U.S. 801, 86 S.Ct. 10, 15 L.Ed.2d 55, to mean a thing of value
offered free of charge as a reward or inducement for certain action.
That case concerned the application of a regulation issued by the
State Supervisor of Liquor Control which prescribed that no adver-
tising of intoxicating liquor shall contain "any statement offering
any coupon, premium, prize or rebate as an inducement to purchase in-
toxicating liquor". In that case, a retail liquor licensee had
advertised the offer of a free Santa Claus bottle cover with the
purchase of certain bottles of liquor. The State Supervisor of
Liquor Control concluded that the advertisement offered a prize
to induce the purchase of intoxicating liquor and suspended the
retail liquor licensee's license. The Supreme Court of Missouri
held that as the advertisement represented that the purchaser
would get an additional article free with his purchase, it con-
veyed the meaning of offering a prize. Thus the court construed
the word prize to denote a thing of value given free of charge as
an inducement to buy certain merchandise.

Mr. Robert T. Leonard

In response to the contention by the licensee that the regulation was invalid because the term "prize" was not defined within the regulation, the court stated that the word prize is well understood, citing Webster's New International Dictionary, Third Edition, wherein prize is defined as follows:

"1. something offered or striven for in competition or in contests of chance: as
a: an honor or reward striven for in a competitive contest: something offered to be competed for or as an inducement to or a reward of effort. . . b: something that may be won by chance (as in a lottery); also: a novelty or other premium given with merchandise as an inducement to buy 2a: something worth striving for: a valuable possession held or in prospect. . . b: something exceptionally good or desirable of its kind. . ."

The word prize therefore has more than one meaning; one, a specialized and limited meaning as defined in lottery cases, the other, a more general and broader meaning as defined in Milgram. It is basic to statutory construction that when a word is used which has more than one meaning, the Legislature will be deemed to have intended to use the word in its more general and broader sense unless some imperative reason can be found for according the word its more limited and specialized meaning. 82 C.J.S. Statutes § 329.

Section 339.100(11) prohibits soliciting or offering to sell real property by either conducting lotteries or contests, or by offering prizes for the purpose of influencing a purchaser or prospective purchaser of real property. When prize is read in its limited sense the last two above clauses of Section 339.100(11) prescribe essentially the same thing. Thus, not only is there no imperative reason to read prize in its limited sense, but it is in the interest of avoiding an unnecessary redundancy to accord the word prize as it is used in Section 339.100(11) its more general and broader meaning.

Thus, we believe that the Legislature intended to use the word prize in Section 339.100(11) to mean a thing of value offered free of charge as an inducement to purchase real property. Thus defined, it is plain that the offering of free radios and free dinners constitutes the offering of a prize.

CONCLUSION

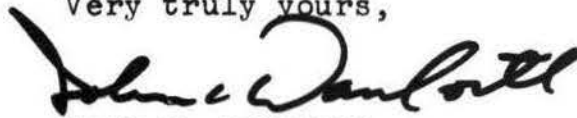
Thus it is the opinion of this office that the offering of

Mr. Robert T. Leonard

free radios or free dinners by a licensed real estate broker in order to induce the public to attend a meeting at which said broker solicits or offers for sale real property in a development within or outside the State of Missouri constitutes soliciting or offering to sell real property by offering prizes for the purpose of influencing a purchaser or prospective purchaser of real property is in violation of Section 339.100(11), RSMo 1969.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Harvey M. Tettlebaum.

Very truly yours,

A handwritten signature in black ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

DIVISION OF MENTAL
HEALTH:

Persons committed to state mental hospitals pursuant to provisions of Section 552.040, RSMo 1969, relating to the commitment and release procedures of persons acquitted on grounds of mental disease or defect, may be placed on convalescent status by the heads of such facilities pursuant to the provisions of Section 202.830, RSMo 1969, and the heads of such facilities are not required to apply for a "conditional" release by the court where the committed person was tried. The courts have no power to restrict or abrogate the authority of the heads of facilities to place such a person on convalescent status under the provisions of Section 202.830 although such heads of facilities cannot grant a final release under that section but must obtain an order of the court under Section 552.040 to release the committed person unconditionally.

OPINION NO. 327

August 6, 1970

George A. Ulett, M. D., Director
Division of Mental Health
722 Jefferson Street
P. O. Box 687
Jefferson City, Missouri 65101



Dear Dr. Ulett:

This opinion is in answer to your question in which you ask whether the head of a facility of the Division of Mental Health has the authority to place a patient committed pursuant to the provisions of Section 552.040, RSMo 1969, on convalescent status under the provisions of Section 202.830, RSMo 1969.

We note that the Seventy-fifth General Assembly in 1969, by House Bill No. 29, repealed Section 552.040, RSMo Supp. 1967 and certain other relevant sections and enacted in lieu thereof certain new sections including what is now designated as Section 552.040, RSMo 1969, relative to the commitment and release procedures of defendants who are acquitted on the grounds of mental disease or defect excluding responsibility.

For the sake of clarity we quote here the provisions of Subsection 3 of Section 552.040, RSMo 1969, showing the new matter by underscore and the omitted matter in brackets:

Dr. George A. Ulett

"3. The provisions of sections 202.810, 202.820, 202.823, 202.830, 202.840, 202.843, 202.847, 202.850, 202.857, 202.870 and 202.875, RSMo, apply to persons committed under subsection 1, but no such person shall be released [conditionally or] unconditionally without an order of court as hereafter provided."

The provisions of Subsection 4 of Section 552.040, RSMo 1969 now provide:

"4. The committed person or the superintendent of a hospital where the person is committed may file an application in the court where the person was tried, seeking an order releasing him conditionally or unconditionally. Copies of the application shall be served personally or by certified mail upon the superintendent of the hospital unless he files the application, the committed person unless he files the application, the director of the division of mental diseases, and the prosecuting or circuit attorney of the county where the committed person was tried and acquitted. The committed person shall be released by order of the court unless either the superintendent of the hospital or the prosecuting or circuit attorney shall, within ten days after the service upon the last one of the two persons, file a written objection thereto. If a written objection is filed within such time the court shall hold a hearing upon notice to the confined person, the superintendent of the hospital, the director of the division of mental diseases, and the prosecuting or circuit attorney of the county where the person was tried. Prior to the hearing any of the parties shall be entitled to an examination of the committed person, upon written application, by a physician of his or its own choosing and at his or its expense. By agreement of all parties to the proceeding any psychiatric report of the mental condition of the committed person which may accompany the application for release or which is filed in objection thereto may

Dr. George A. Ulett

be received in evidence without testimony in person of the examining physician. Upon the hearing the court shall either deny the application or order an unconditional release or a conditional release under section 202.830, RSMo, where applicable. Any order denying the application shall be without prejudice to the filing of another application after one hundred eighty days from the denial of the prior application."

Section 202.830, RSMo 1969 provides:

"1. The head of a facility may release an improved patient on convalescent status when he believes that such release is in the best interests of the patient. Release on convalescent status shall include provisions for continuing responsibility to and by the facility, including a plan of treatment on an outpatient or nonhospital patient basis. Prior to the end of the year on convalescent status, and not less frequently than annually thereafter, the head of the hospital shall reexamine the facts relating to the hospitalization of the patient on convalescent status and, if he determined that in view of the condition of the patient hospitalization is no longer necessary, he shall discharge the patient.

"2. Prior to such discharge, the head of the facility from which the patient was given convalescent status may readmit the patient at any time. If there is reason to believe that it is to the best interests of the patient to be rehospitalized, the division or the head of the facility may issue an order for the immediate rehospitalization of the patient. Such an order, if not voluntarily complied with, upon the endorsement by a judge of a court of record of the county in which the patient is resident or present, shall authorize any health or police officer to take the patient into custody and transport him to the facility or, if the order is issued by the division, to

Dr. George A. Ulett

a facility designated by it."

Additionally, we wish to point out that the Division of Mental Health is referred to as the Division of Mental Diseases in Chapter 552 although the 1969 changes in Chapter 202 RSMo, (House Bill No. 43 of the Seventy-fifth General Assembly,) indicate a change in name of the division to the "division of mental health". Section 202.010, RSMo 1969.

In view of the fact that that the legislature omitted the above bracketed matter, that is, "conditionally or" and inserted the reference to Section 202.830 it is our view that the legislature intended that the head of such a facility may release an improved patient on convalescent status pursuant to the provisions of Section 202.830 and that such a "release" constitutes essentially a "conditional" release by the head of the facility but obviously is not by any means a final release or discharge from the facility.

It is also our view that Subsection 4 of Section 552.040, RSMo 1969, authorizes the superintendent of the hospital where the person is committed or the committed person to file an application in the court where the person was tried seeking an order to release him conditionally or unconditionally. It is our interpretation that the superintendent is not required to file an application with the court to seek a conditional release for such a person but, under the changes in Subsection 3, as we stated, may release the patient on convalescent status under the provisions of Section 202.830, RSMo 1969. Obviously such provisions as are contained in Section 202.830, RSMo 1969, which authorize a final discharge of the patient do not apply to patients committed under Section 552.040 for the clear reason that only the courts may order an unconditional release.

It has also been called to our attention that the various mental hospitals have received court orders both antedating the effective date of House Bill No. 29 which made the indicated changes in Section 552.040, and also orders subsequent to that date which orders purport to require the head of the facility to obtain an order of the court before the committed person is released under any circumstances. As we stated, however, the legislature has clearly given the heads of such facilities the authority under Section 202.830 to place such persons on convalescent status and the courts are now without power to restrict or abrogate this legislative grant of authority.

CONCLUSION

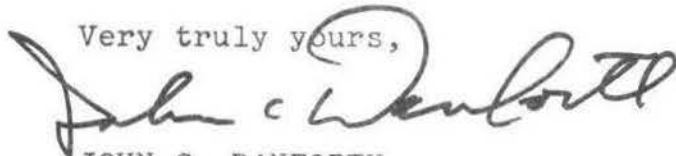
It is therefore the conclusion of this office that persons

Dr. George A. Ulett

committed to state mental hospitals pursuant to the provisions of Section 552.040, RSMo 1969, relating to the commitment and release procedures of persons acquitted on grounds of mental disease or defect, may be placed on convalescent status by the heads of such facilities pursuant to the provisions of Section 202.830, RSMo 1969, and the heads of such facilities are not required to apply for a "conditional" release by the court where the committed person was tried. The courts have no power to restrict or abrogate the authority of the heads of facilities to place such a person on convalescent status under the provisions of Section 202.830, although such heads of facilities cannot grant a final release under that section but must obtain an order of the court under Section 552.040 to release the committed person unconditionally.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Klaffenbach.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being the most prominent part.

JOHN C. DANFORTH
Attorney General

MARRIAGES:

RECORDER OF DEEDS:

The marriage license form provided in Section 451.080, RSMo 1969, is not mandatory but may be revised in order

to accommodate the provisions of Section 451.100, RSMo 1969, which authorizes religious organizations of this state to solemnize marriages. When a marriage is solemnized by a religious organization and not by a minister or other authorized individual such organization must designate some person to certify that the marriage was performed by the religious body according to its regulations and customs and that at least one of the parties thereto is a member of such organization.

OPINION NO. 329

September 30, 1970

Honorable Maurice Schechter
State Senator
District No. Thirteen
41 Country Fair Lane
Creve Coeur, Missouri 63141



Dear Senator Schechter:

This letter is in response to your request for an opinion from this office in which you ask the following question:

"The regular session of the 75th General Assembly passed House Bill No. 357 which was approved by the Governor and pertained to Section 451.100 relating to marriages.

"Section 451.080 which was not changed, still has the wording of the old law which requires the person solemnizing the marriage to execute the license application and return to the recorder of deeds.

"Does House Bill No. 357 change the procedure and the forms in the recorder of deeds office to comply with the provisions of House Bill No. 357 or will it require

Honorable Maurice Schechter

a change in Section 451.080 to coincide with the provisions of new Section 451.100."

Section 451.080, RSMo 1969, to which you refer states as follows:

"1. The recorders of the several counties of this state, and the recorder of the city of St. Louis, shall, when applied to by any person legally entitled to a marriage license, issue the same which may be in the following form:

State of Missouri,)
) ss
County of _____)

This license authorizes any judge, magistrate, licensed or ordained preacher of the gospel, or other person authorized under the laws of this state, to solemnize marriage between A B of _____, county of _____ and state of _____, who is _____ the age of twenty-one years, and C D of _____, in the county of _____, state of _____, who is _____ the age of eighteen years.

"2. If the man is under twenty-one or the woman under eighteen, add the following:

The father or mother or guardian, as the case may be, of the said A B or C D (A B or C D, as the case may require), has given his or her assent to the said marriage.

Witness my hand as recorder, with the seal of office hereto affixed, at my office, in _____, the ____ day of ____, 19____, recorder.

"3. On which said license the person solemnizing the marriage shall, within ninety days after the issuing thereof, make as near as may be the following return, and

Honorable Maurice Schechter

return such license to the officer issuing the same:

State of Missouri,)
) ss
County of _____)

This is to certify that the undersigned
_____ did at _____ in said county,
on the _____ day of _____, A.D.
19____, unite in marriage the above-
named persons."

The repealed Section 451.100 stated:

"Marriages may be solemnized by any licensed or ordained preacher of the gospel, who is a citizen of the United States, or who is a resident of this state and a pastor of any church in this state, or by any judge of a court of record, except judges of the probate court."

As you indicated, House Bill No. 357 of the Seventy-fifth General Assembly enacted what is now designated as Section 451.100, which states:

"Marriages may be solemnized by any clergyman, either active or retired, who is a citizen of the United States, and who is in good standing with any church or synagogue in this state, or by any judge of a court of record. Marriages may also be solemnized by a religious society, religious institution, or religious organization of this state, according to the regulations and customs of the society, institution or organization, when either party to the marriage to be solemnized is a member of such society, institution or organization."

We note that Section 451.080 provides that the marriage license "may be" in the form stated therein. We view this language as being directory only and not mandatory and accordingly it is our view that such recorders may utilize a license form which in substance complies with the legislative intent.

Honorable Maurice Schechter

The provisions of these sections indicate that such religious societies, organizations and institutions would have a regular membership body, organization and regulations or customs governing such organization and in accordance with such regulations or customs of such organization, or its by-laws, will have designated some person in an official capacity, as an officer of such organization, to act in behalf of such organization with authority to certify that the parties to the marriage ceremony were duly united in marriage.

It is also our view that the persons so designated should certify that the marriage was performed by the religious organization according to its regulations and customs and that at least one of the parties thereto is a member of such organization.

In as much as Section 451.100, RSMo 1969, was enacted later than Section 451.080, and since we view the form prescribed by Section 451.080 as only directory, we conclude that such recorders have the authority to revise the license form to recognize the authority given religious societies, institutions and organizations under Section 451.100, RSMo 1969. Although an amendment to Section 451.080 would be advisable, such an amendment is not required in order to give effect to the legislative intent.

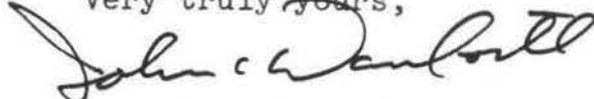
CONCLUSION

It is therefore the opinion of this office that the marriage license form provided in Section 451.080, RSMo 1969, is not mandatory but may be revised in order to accommodate the provisions of Section 451.100, RSMo 1969, which authorizes religious organizations of this state to solemnize marriages.

When a marriage is solemnized by a religious organization and not by a minister or other authorized individual such organization must designate some person to certify that the marriage was performed by the religious body according to its regulations and customs and that at least one of the parties thereto is a member of such organization.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Klaffenbach.

Very truly yours,



JOHN C. DANFORTH
Attorney General

CRIMINAL COSTS:
COMPTROLLER:

An information which alleges that the defendant did: "willfully, unlawfully, feloniously and with malice aforethought", but does not contain the phrase "on purpose" is insufficient to charge a violation of Section 559.180 RSMo 1959 and the State of Missouri is not liable for payment of the costs in such a case.

OPINION NO. 331

May 26, 1970

Honorable G. William Weier
Prosecuting Attorney
Jefferson County
P. O. Box 246
Hillsboro, Missouri 63050



Dear Mr. Weier:

This is in response to your letter of May 6, 1970, asking for an opinion on a question which was presented in your letter as follows:

"The question we have is whether the term 'on purpose' is necessary in order that the State pay the cost, even though the terms 'willfully, unlawfully, feloniously and with malice aforethought' were used in the Information; and further, that the Statute referred to in the Information was Section 559.180, which range of punishment for said Statute is not less than 2 years in the Department of Corrections. Under Section 550.040, it would appear that the State of Missouri, rather than the County of Jefferson, should pay the cost in this case."

Section 559.180, RSMo 1959, provides:

"Every person who shall, on purpose and of malice aforethought, shoot at or stab another, or assault or beat another with a deadly weapon, or by any other means or force likely to produce death or great bodily harm, with intent to kill, maim, ravish or rob such person, . . . shall be punished by imprisonment in the penitentiary not less than two years."

Honorable G. William Weier

You further advised us that the fee bill, properly executed, was transmitted to the Office of the Comptroller and was rejected by that Office on the grounds that the phrase "on purpose" was not contained in the Information and in support of that position, the Comptroller's Office relied upon the opinion of this Office addressed to the Honorable Forest Smith, March 8, 1940, Opinion No. 83, (a copy of which is enclosed). The 1940 opinion dealt with the distinction between Section 4014, RSMo 1929 (predecessor to Section 559.180) and Section 4015, RSMo 1929 (predecessor to 559.190).

The present 559.190, RSMo 1959, provides:

"Every person who shall be convicted of an assault with intent to kill, or to do great bodily harm, or to commit any robbery, . . . the punishment for which assault is not hereinbefore prescribed, shall be punished by imprisonment in the penitentiary not exceeding five years, or in the county jail not less than six months, or by a fine not less than one hundred dollars and imprisonment in the county jail not less than three months, or by a fine of not less than one hundred dollars."

The author of the 1940 opinion describes the relationship between Sections 559.180 and 559.190 as follows:

"The distinction between Section 4014, supra, and Section 4015, supra, is the fact that Section 4015 does not include the words 'on purpose and of malice aforethought' and the punishment in Section 4015 can be as low as a fine of one hundred dollars. Under Section 4014, supra, according to our previous opinions rendered to you, the state would be liable for the costs. Also, under Section 4015, supra, according to our previous opinions rendered to you, in case of an acquittal of the defendant, the county would be liable for the costs."

In the conclusion, the writer of that opinion stated:

". . . it is the opinion of this department that the information under Section 4014 RSMo 1929, should contain the words 'on purpose and of malice aforethought'. . . ."

Honorable G. William Weier

The question here, is whether the terms "willfully, unlawfully, feloniously and with malice aforethought" are the equivalent to the phrase: ". . . on purpose and of malice aforethought".

The precise question raised by the opinion request was presented in State v. McDonald, 67 Mo. 13 (1877). The court stated that it was evidently the intention of the pleader to frame the indictment under Section 29, Vol. 1, Wag. Mo. Stat., 1872 (predecessor to Section 559.180). Section 29 provided:

"Every person who shall on purpose,
and of malice aforethought. . . ."

The court stated:

". . . he omitted to charge that the assault was made 'on purpose' and it has so often been held by the court that an indictment is not good under that section if those words are omitted, that it must be regarded as definitely settled. . . ." loc. cit. 67 Mo. 13, 16.

In discussing the indictment the court stated:

". . . The indictment charged 'that Henry McDonald, . . . did willfully, unlawfully, feloniously and of his malice aforethought,'"

The court concluded that the defendant was properly charged under the predecessor to 559.190.

Although the necessity of the phrase "on purpose" has not been specifically raised subsequent to the McDonald case, that case has been cited with approval on a number of occasions. State v. Sevier, 83 S.W.2d 581 (Mo. S.Ct., in Banc, 1935); State v. Foster, 220 S.W. 958, 959 (Mo. S.Ct. 1920) and State v. Ostman, 126 S.W. 961 (St.L.Ct.App., 1910).

It is the conclusion of this office that the phrase "on purpose" is necessary to charge an assault under 559.180.

In determining whether the state is liable for costs under Section 550.040, the allegations contained in the indictment are controlling. In State ex rel. Timberman, Sheriff v. Hackman, State Auditor, 257 S.W. 457, 458 (Mo.S.Ct., in Banc, 1924) the court stated:

Honorable G. William Weier

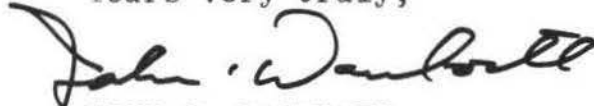
". . . In such a case it cannot be well said that the charge in the information is not the basis for fixing the liability of the state. The statute [Section 550.040] is speaking of certain offenses, and says, if the defendant is acquitted of such offenses, then the state shall pay the costs. It (the statute) says nothing about what might occur during the trial. It is dealing with the issues made by the pleadings. . . ." loc. cit. 257 S.W. 457, 458.

CONCLUSION

It is the opinion of this office that an information which alleges that the defendant did: "willfully, unlawfully, feloniously and with malice aforethought", but does not contain the phrase "on purpose" is insufficient to charge a violation of Section 559.180 RSMo 1959 and the State of Missouri is not liable for payment of the costs in such a case.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Craft.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 83
3-8-40, Smith

SOIL AND WATER COMMISSION:
COUNTY COURTS:
TAXATION:

When the governing body of a watershed subdistrict levies a tax pursuant to Sections 278.240 and 278.250, RSMo

Supp. 1967, and certifies the levy to the county court, the county court and appropriate county officials must levy and collect the tax.

OPINION NO. 332

June 8, 1970

Honorable Lee E. Norbury
Executive Secretary
Missouri State Soil and Water
Districts Commission
705 Hitt, University of Missouri
Columbia, Missouri 65201



Dear Mr. Norbury:

This is in reply to your request for an official opinion of this office, which request reads as follows:

"Section 278.250 RSMo provides authority for Watershed Subdistricts to levy certain taxes.

"In 1969 the Pike Creek Watershed Subdistrict certified the organization tax (provided in paragraph 1) to the County Courts of Shannon and Carter Counties. Subsequently, these bodies refused to carry through the levy requested. Again in 1970 the procedure has been repeated and again these Courts refuse to comply.

"We would like an opinion as to the authority of the County Courts and other county officials in refusing to comply with the provisions of this statute."

Watershed subdistricts are authorized by Sections 278.160 through 278.300, RSMo, and are run by a governing body provided for by Section 278.240, RSMo Supp. 1967. One of the powers of the governing body is to levy an annual tax as follows:

"(4) To levy an annual tax and organization tax on the real property within the subdistrict subject to the limitations provided in section 278.250 for payment of the costs for carrying out any authorized purpose of such subdistrict;" Section 278.245, RSMo Supp. 1967.

Honorable Lee E. Norbury

Section 278.250, RSMo Supp. 1967, reads in part as follows:

"1. In order to facilitate the preliminary work of the subdistrict the governing body of the subdistrict may levy an organization tax of not to exceed forty cents per one hundred dollars of assessed valuation of all real estate within the subdistrict, the proceeds of which may be used for organization and administration expenses of the subdistrict, the acquisition of real and personal property, including easements for rights-of-way, necessary to carry out the purposes of the subdistrict. This levy may be made one time only. The organization tax may be imposed as provided for in subsections 4 and 5.

*

*

*

"4. The governing body shall make the necessary levy on the assessed valuation of all real estate within the boundaries of the subdistrict to raise the needed amounts, but in no event shall the levy exceed forty cents on each one hundred dollars of assessed valuation per annum and, on or before the first day of September of each year, shall certify the rate of levy to the county court of the county or counties within which the subdistrict is located with directions that at the time and in the same manner required by law for the levy of taxes for county purposes the county court shall levy a tax at the rate so fixed and determined upon the assessed valuation of all real estate within the subdistrict, in addition to such other taxes as are levied by the county court.

"5. The body having authority to levy taxes within the county shall levy the taxes provided in this law, and all officials charged with the duty of collecting taxes shall collect the taxes at the time and in the form and manner and with like interest and penalties as other taxes are collected; computation shall be made on the regular tax bills, and when collected shall pay the same to the subdistrict ordering its levy and collection or entitled to the same, and the payment of such collections shall be made monthly to the treasurer of the subdistrict. The proceeds shall be kept in a separate account by the treasurer of the subdistrict and identified by the official name of the subdistrict in which

Honorable Lee E. Norbury

the levy was made. Expenditures from the fund shall be made on requisition of the chairman and secretary of the governing body of the subdistrict."

Thus, the statutes are clear and specifically authorize the governing body of a watershed subdistrict to levy a tax. When this levy is certified to the county court of the counties where the district is located it is the duty of the county court to levy the tax at the rate fixed and it is likewise the duty of the appropriate county officials to collect the taxes. These duties are not discretionary but are ministerial and the county officials must conform to the statute, subject to mandamus if they refuse. See State ex rel. State Tax Commission v. Briscoe, Mo. Banc, 451 S.W. 2d 1 (1970). In such case the Supreme Court of Missouri said, l.c.5, in reference to the case of State ex rel Thompson v. Bethards, 9 S.W.2d 603:

" * * * The court held at 9 S.W.2d l.c.606, ' * * * the clerk of the county court has a duty to perform the orders of the state board of equalization, direct and positive, and it may compel him to perform such orders if necessity requires.' Accord: First Trust Co. of St. Joseph v. Wells, 324 Mo.306, 23 S.W.2d 108; State ex rel Thompson v. Jones, banc, 328 Mo.267, 41 S.W.2d 393."

The court further said, l.c.5:

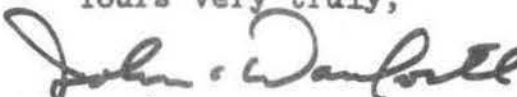
"The county clerk must perform the ministerial duties enjoined upon him by law and must extend and compute the taxes on the valuations set by the state tax commission. * * *"

CONCLUSION

It is the opinion of this office that when the governing body of a watershed subdistrict levies a tax pursuant to Sections 278.240 and 278.250, RSMo Supp. 1967, and certifies the levy to the county court, the county court and appropriate county officials must levy and collect the tax.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Walter W. Nowotny, Jr.

Yours very truly,



JOHN C. DANFORTH
Attorney General

METROPOLITAN SEWER DISTRICT: The Metropolitan St. Louis Sewer District has authority to spend money for planning and surveys outside its boundaries.

OPINION NO. 333

May 28, 1970



Honorable Thomas A. Walsh
State Representative
1820 A Warren Street
St. Louis, Missouri 63106

Dear Representative Walsh:

This opinion is in answer to your question concerning the Metropolitan St. Louis Sewer District in which you asked:

"Is the expenditure of metropolitan sewer district funds for purposes outside the district authorized by law?"

Your letter further indicates that you are concerned principally with the expenditure of sewer district funds for planning outside the boundaries of the District.

It is also our understanding that two direct questions are involved in this inquiry; i.e., whether the Metropolitan St. Louis Sewer District can participate with St. Louis County and the Federal Water Pollution Control Commission in the costs of making studies of the collection of sewage within the Grand Glaize Watershed of which the Sugar Creek Watershed is a tributary part, and the carriage of such sewage to the Meramec River, and also a study of the proper method of collecting and treating sewage in St. Louis County outside of the district on a watershed basis, so that the board of trustees can determine whether to approve annexation of the remainder or a portion of the remainder of the county to the district.

The Metropolitan St. Louis Sewer District was established under the provisions of Section 30 of Article VI of the Missouri Constitution. The Plan for the district was submitted to the voters of St. Louis and St. Louis County at a special election February 9, 1954, and was accordingly approved. Subsequently the Missouri Supreme Court upheld the validity of the Plan in State v. Metropolitan St. Louis Sewer District, 275 S.W.2d 225 (En banc 1955).

Honorable Thomas A. Walsh

The sections that we hereafter refer to are sections of the Plan which, with respect to the District, are legislative in character.

The boundaries of the District, Section 2.010, may be extended by petition of the area landowners, approval of the Board, and by vote if required, Section 2.020.

Section 3.020 provides for broad powers for the District and expressly states that the enumeration of powers in the Plan does not operate to restrict the meaning of the general grant of powers or to exclude other powers comprehended within the general grant. Among other things, the District has the power under Section 3.020 of the Plan:

"(7) To contract with municipalities, districts, other public agencies, individuals, or private corporations, or any of them whether within or without the District, for the construction, use, or maintenance of common or joint sewage, drainage, outlets, and disposal plants, or for the performance of any service required by this District.

"(8) To contract with, and thereunder to permit municipalities, districts, other public agencies, individuals, or private corporations, or any of them whether within or without the District, to connect with and use the facilities of the District. . .

"(9) To enter into and perform contracts whether long term or short term, with any establishment, whether within or without the District, for the provision and operation by the District of sewerage facilities to evade or reduce the pollution of waters caused by discharges of wastes by such establishment, and the payment periodically by such establishment to the District of amounts at sufficient to compensate the District for the costs of providing (including payment of principal and interest charges, if any) and operating and maintaining the sewerage facilities serving such establishment.

"(10) To enter into negotiations with the Federal Government and the State of Missouri and other states and political subdivisions thereof, or the agencies of any of them, and

Honorable Thomas A. Walsh

apply for and obtain from any of them, any and all assistance and grants-in-aid that may be available.

* * *

"(18) To enter on any lands, waters, and premises for the purposes of making surveys, soundings, and examinations.

"(19) To approve, revise, or reject the plans and designs of all out-fall sewers, trunks, mains, submains, interceptors, lateral sewers, outlets for sewerage, storm water drains, pumping and ventilating stations, and disposal and treatment plants and works proposed to be constructed, altered, or reconstructed by any other person or corporation, private or public, in the District."

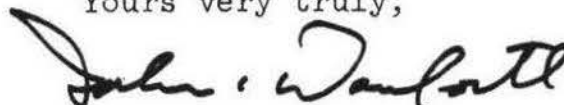
It is our view that the District must have the right to make plans and carry on surveys outside of the limits of the District in order that the Board and the public be fully informed and also for effective, comprehensive planning. For example, we understand that the Sugar Creek Watershed is within the District and that only a part of Grand Glaize Watershed is within the District, and that as land development continues, enlargement and improvement of the present treatment plant will become necessary unless an alternative method of sewage disposal is determined. Although the remainder of the Grand Glaize Watershed is outside of the District, it is our view that the Board has the authority to make studies of the advisability of contracting with private or public facilities with respect to that watershed. Similarly, in our view, the Board has authority to expend District money to plan for and determine the feasibility of expansion by extension of district limits.

CONCLUSION

It is the conclusion of this office that the Metropolitan St. Louis Sewer District has authority to spend money for planning and surveys outside its boundaries when the planning and surveys are necessary to the function of the District and the exercise of any of its powers.

The foregoing opinion, which I hereby approve, was prepared by my assistant John C. Klaffenbach.

Yours very truly,



JOHN C. DANFORTH
Attorney General

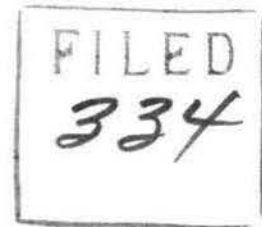
ASSESSMENT OF REAL PROPERTY:
ASSESSORS:
REAL PROPERTY:
TAXATION:

An assessor cannot assess real property in subsequent years for any prior year in which such real estate was assessed even though the assessor was not aware of the fact that improvements were on such land on January 1 of the prior year when the land and the improvements were owned by the same person as of January 1 of the prior year.

OPINION NO. 334

July 31, 1970

Mr. Jim Tom Reid
County Counselor
Jackson County
Suite 202 Court House
Kansas City, Missouri 64106



Dear Mr. Reid:

This is in response to your request for an opinion on the following questions:

"1) Where a tax bill based upon an assessment of land only, has been issued and paid in a particular year, may an assessment be made for that particular year in a subsequent year when it is discovered that in actuality improvements were located upon that land as of January 1 of the particular year?

"2) If such a corrective assessment can be so made in a subsequent year for such prior year, can the County Collector legally enforce collection procedures toward collection of the amount of the increased tax resulting from the increased assessment when the original prior year's assessment and bill has been paid in full?"

We assume that the question relates to assessment of land and improvements under single ownership, and not separate assessments of land and improvements to different owners.

The statutes applicable to your questions are:

"The following words, terms and phrases when used in laws governing taxation and revenue in the state of Missouri shall have the meanings

Mr. Jim Tom Reid

ascribed to them in this section, except when the context clearly indicates a different meaning:

* * *

"(2) 'Real property' includes land itself, whether laid out in town lots or otherwise, and all growing crops, buildings, structures, improvements and fixtures of whatever kind thereon, and all rights and privileges belonging or appertaining thereto;" (Section 137.010, RSMo)

"If by any means any tract of land or town lot shall be omitted in the assessment of any year or series of years, and not put upon the assessor's book, the same, when discovered, shall be assessed by the assessor for the time being, and placed upon his book before the same is returned to the court, with all arrearages of tax which ought to have been assessed and paid in former years charged thereon." (Section 137.165, RSMo)

The accepted rule is that the power to levy and collect taxes must be based upon clear statutory authority.

". . . The decision [Carter Carburetor Corporation v. City of St. Louis, 356 Mo. 646, 203 S.W.2d 438] was bottomed on the principle, which continues to be our guide, that the power to tax is an extraordinary one and must be based on specific or clearly implied authority. . . ." (State ex rel. Agard v. Riederer, 448 S.W.2d 577, 579 (Mo. en banc 1969))

"Real property" is defined by Section 137.010(2), RSMo, to include both land and any buildings, structures, improvements and fixtures of whatever kind thereon. Section 137.165, RSMo, gives the assessor the authority to assess at anytime " . . . any tract of land or town lot . . ." that has been "omitted" from assessment in former years. Section 137.165, RSMo, has existed without appreciable change since 1835 (L. 1835, p. 534, §25). Prior to 1949, present Section 137.010, RSMo, provided in part:

"The term 'real property,' 'real estate,' 'land' or 'lot' wherever used in this chapter, shall be held to mean and include not only the land

Mr. Jim Tom Reid

itself, whether laid out in town or city lots or otherwise, with all things contained therein, but also all buildings, structures and improvements and other permanent fixtures, of whatever kind thereon, . . ." (Section 11211, RSMo 1939)

The legislature in 1945 (L. 1945, p. 1799, §3) and in 1949 (Senate Bill No. 1021, 1949) enacted the present version of Section 137.010, RSMo. With this change in Section 137.010, RSMo, we think it even clearer that the legislature has only authorized assessors to make subsequent assessments of omitted "tracts of land." Since the assessment of any tract of land or a town lot includes the value of the buildings thereon when both are owned by the same person, the entire tract of land including buildings thereon was assessed in prior years and cannot be construed to be a tract of land or town lot which was omitted in the assessment of such prior year. (Section 137.165, RSMo).

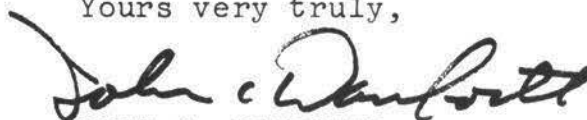
Because of this view we take of your first question, it is not necessary to answer your second question.

CONCLUSION

It is the opinion of this office that an assessor cannot assess real property in subsequent years for any prior year in which such real estate was assessed even though the assessor was not aware of the fact that improvements were on such land on January 1 of the prior year when the land and the improvements were owned by the same person as of January 1 of the prior year.

The foregoing opinion, which I hereby approve, was prepared by Assistant, Lauren R. Wood.

Yours very truly,



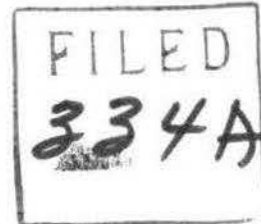
JOHN C. DANFORTH
Attorney General

Answer by letter-Wood

September 16, 1970

OPINION LETTER NO. 334A

Mr. Jim T. Reid
County Counselor
Jackson County
Suite 202, Court House
Kansas City, Missouri 64106



Dear Mr. Reid:

You have requested a clarification of our Opinion No. 334 of 1970 on the subject of assessments of improved real property with the following questions:

- "1. Where a property has been correctly assessed as an improved property in previous years and where because of clerical and or data processing error the assessed value of the improvement is stricken from the total assessed value, is it permissible to proceed with the issuance of an additional bill for the improvement only for the escaping year even though a tax bill for land only had been issued and paid by the property owner?
- "2. Where an improvement has been picked up and the owner of the property has been furnished with a proper Raise Notice providing for appeal if he feels aggrieved and where no such appeal was made but there was clerical and or data processing error the improvement raise was not added to the data processing record, can the bill be issued subsequently for the improvement only for the year of escape?"

We assume that your questions refer to clerical or data processing errors occurring within the assessor's office, and with

Mr. Jim T. Reid

this assumption, we see no reason to depart from the result reached in our earlier opinion. In both situations described in your questions as set out above, the assessment of real property by the assessor for a particular tax year has been completed and the assessor's book delivered to the county court as provided in Section 137.245, RSMo. The assessor thereafter has no power to change this assessment.

" . . . Also, the assessor is required to make out and return to the county court, by January 2d, [now May 31] a verified copy of his assessor's book (section 9800 . . .) [now Section 137.245, RSMo]; and the return of this book to the county clerk's office completes the assessment and terminates his jurisdiction. . . ."
(Wymore v. Markway, 89 S.W.2d 9, 13 (Mo. 1935))

The Supreme Court of Missouri has held that a county clerk cannot increase the assessor's valuation of land following the annual delivery of the assessor's book to the county court because the county clerk had no such authority conferred upon him by law. (State ex rel. Teare v. Dungan, 177 S.W. 604, 609 (Mo. 1915)). By the same token, we are unaware of any authority conferred by law upon the assessor to increase his own assessments following the statutorily required delivery of the assessor's book to the county court. The County Board of Equalization (Section 138.100, RSMo) and the State Tax Commission (Sections 138.380 and 138.460, RSMo) may have such authority, but this authority must be exercised during the particular tax year. Your questions appear to relate to errors discovered in a subsequent year, and in that circumstance, we do not believe the assessment can be increased by any officer or body.

Yours very truly,

JOHN C. DANFORTH
Attorney General

FIRE PROTECTION
DISTRICTS:

A fire protection district may be formed in a third class county under Chapter 321, RSMo as amended. A fire protection district cannot be formed to encompass an area or territory in more than one county.

OPINION NO. 335

July 1, 1970

Honorable John E. Parrish
Prosecuting Attorney
Camden County Court House
Camdenton, Missouri 65020



Dear Mr. Parrish:

This is in response to your request for an opinion from this office as follows:

"(1) Can a Fire Protection District under Chapter 321, RSMo, be formed in a third class county?

"(2) Can a Fire Protection District be formed encompassing an area within more than one county and, if so, in what county is the petition for organization of a district filed?"

The establishment and maintenance of fire protection districts is covered under Chapter 321, RSMo.

Sections 321.510 to and including 321.715, RSMo, which applied to the formation and maintenance of fire protection districts in class two, three and four counties, were repealed by Senate Committee Substitute for House Bill No. 322, Seventy-fifth General Assembly, hereinafter referred to as House Bill 322. Under these statutes, a fire protection district could be wholly within a county or in two or more counties, but had to consist of contiguous tracts or parcels of property. They also provided that the circuit court in the county in which a major portion of the area was located had authority to establish such districts and retain jurisdiction in any subsequent action involving the district. They further provided for the decree of incorporation to be filed with the recorder of deeds in each county. They also provided for the tax rate to be certified to the county court of

Honorable John E. Parrish

each county and for the officers to levy and collect taxes in the county and to levy and collect the taxes for such district.

Sections 321.010 to and including Sections 321.470, RSMo provided for the establishment and maintenance of fire protection districts in class one counties. Section 321.010, RSMo, Supp. 1967, provided such district must be wholly within a county of class one. House Bill No. 322 contains a new section known as 321.010. Under this section the district must consist of contiguous tracts or parcels of property and may include within its boundaries, or may be contiguous with, any city, town or village. The provision which required the territory to be wholly within a county in class one, has been omitted.

Section 321.020 as reenacted provides that the circuit court, "sitting in and for any county of this state" or any judge in vacation may, as provided in this chapter, establish fire protection districts. Section 321.080 as reenacted provides that the circuit court, "in and for the county in which the petition for the organization of the district has been filed shall thereafter maintain and have original and exclusive jurisdiction over all matters connected with or affected by said district." Section 321.030 RSMo provides that organization of a district shall be initiated by a petition filed in the office of the circuit clerk in the county in which the real property in the proposed district is situated.

Section 321.625, RSMo which was repealed, provided for the board of directors, on or before the 15th day of May each year, to certify the rate of levy, "to the county courts of the counties within which the district is located." This section was not reenacted. Section 321.250, RSMo provides that on or before the 15th day of May, the director shall certify, "to the county court of the county within which the district is located" a rate of levy so fixed by the board. Section 321.220, as reenacted, provides for the prosecuting attorney, "for the county in which the fire protection district is located" to prosecute any violations of this law. It further provides for the pensioning of the members of the fire department by a vote of a majority of the voters after a notice of such election is published in a newspaper of general circulation, "in the county in which the district is located."

There is no provision in House Bill No. 322 for the tax levy to be certified to the county court in more than one county or for the collection of taxes in more than one county. Those provisions were in the statutes that were repealed and have been omitted from the statutes as reenacted.

A fire protection district organized under Chapter 321,

Honorable John E. Parrish

RSMo is a political subdivision. Section 321.010, RSMo. Political subdivisions of this state have only such authority as it is expressly granted by statute in express words and such authority as is necessarily fairly implied as essential and necessary in the performance of those powers and authority that are expressly granted. Lancaster v. Atchison County, 180 S.W.2d 706, 352 Mo. 1039.

In answer to your question whether a fire protection district can be formed in a class three county, it is our opinion that the provisions of House Bill No. 322, as enacted by the Seventy-fifth General Assembly, 1969, applies to all counties of the state and that a fire protection district may be established in a third class county.

In answer to your question whether a fire protection district can be formed to encompass an area within more than one county, it is our opinion that a fire protection district cannot be formed to include an area or territory in more than one county. Those provisions of the statute providing for fire protection districts to include territory in more than one county were repealed and there is no statutory authority under the present statutes to form districts to include territory in more than one county. Since a fire protection district has only such authority as is expressly given by statute, it is our opinion that a fire protection district cannot be formed to include territory in more than one county.

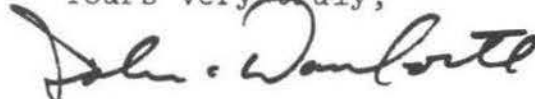
CONCLUSION

It is the opinion of this office that:

1. A fire protection district may be formed in a third class county under Chapter 321, RSMo as amended.
2. A fire protection district cannot be formed to encompass an area or territory in more than one county.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,



JOHN C. DANFORTH
Attorney General

SCHOOLS:
APPROPRIATIONS:
CONSTITUTIONAL LAW:

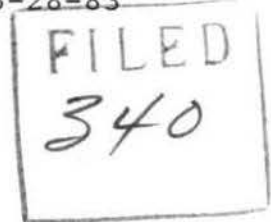
1. That the Governor may not constitutionally veto an appropriation bill for free public schools. 2. That the Governor may not constitu-

tionally veto any portion of an appropriation bill for free public schools. 3. That the Governor may not reduce any portion of an appropriation for public schools. 4. That the Governor, at his discretion, may constitutionally control by allotment or other means and thereby reduce the expenditure of funds below their appropriations only when the actual revenues are less than the revenue estimates upon which the appropriations were based. 5. The phrase "not reduce" for free public schools, as found in Article IV, Section 28, Constitution of Missouri, 1945, is a prohibition against executive reduction of any amount appropriated by the Legislature to free public schools. 6. The phrase "revenue estimates upon which appropriations were based" refers to those amounts as set forth in the budget submitted to the General Assembly, except in those instances in which the General Assembly has by its appropriation bill, set forth its estimate of revenues for the period during which the appropriation was made, or, if not specifically stated in the appropriation bills, then the total of the appropriations as passed by the Legislature, would represent the estimated revenue upon which appropriations were based. 7. That the Governor may control the expenditure rates without being required to reduce all appropriations by a pro rata percentage.

OPINION NO. 340
See ADDENDUM issued
3-28-83

May 22, 1970

Honorable Warren E. Hearnes
Governor, State of Missouri
Executive Office
Jefferson City, Missouri 65101



Dear Governor Hearnes:

This is in response to your request for an official opinion of this office with respect to the following questions presented by you:

- "1. May the Governor veto an appropriation bill for free public schools?
- "2. May he veto any portion thereof?
- "3. May the Governor reduce any portion of an appropriation for public schools without vetoing that portion?

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- "4. May the Governor control by allotment and thereby reduce the distribution of such funds?
- "5. Does 'not reduce' for public schools refer only to not going below the constitutional requirement of one-fourth of general revenue for free public schools?
- "6. Does 'revenue estimates upon which appropriations were based' refer to the official estimates presented to the General Assembly by the executive budget and his budget staff or perhaps other estimates?
- "7. Does control of expenditure rates apply as to any single appropriation without being required to reduce other appropriations by the same percentage?
- "8. If the Governor is without power to veto an appropriation to schools or any portion thereof, and without power to reduce such appropriation or to control the expenditure, how then would he comply with the constitutional ban on deficit spending should the General Assembly appropriate, to public schools, more money than exists in the entire general revenue fund?"

For reasons which we shall develop in the course of this opinion, we conclude:

- 1. That the Governor may not constitutionally veto an appropriation bill for free public schools.
- 2. That the Governor may not constitutionally veto any portion of an appropriation bill for free public schools.
- 3. That the Governor may not reduce any portion of an appropriation for public schools.
- 4. That the Governor, at his discretion, may constitutionally control by allotment or other means and thereby reduce the expenditure of funds below their appropriations only when the actual revenues are less than the revenue estimates upon which the appropriations were based.
- 5. The phrase "not reduce" for free public schools, as found in Article IV, Section 28, Constitution of Missouri, 1945, is a

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prohibition against executive reduction of any amount appropriated by the Legislature to free public schools.

6. The phrase "revenue estimates upon which appropriations were based" refers to those amounts as set forth in the budget submitted to the General Assembly, except in those instances in which the General Assembly has by its appropriation bill, set forth its estimate of revenues for the period during which the appropriation was made, or, if not specifically stated in the appropriation bills, then the total of the appropriations as passed by the Legislature, would represent the estimated revenue upon which appropriations were based.

7. That the Governor may control the expenditure rates without being required to reduce all appropriations by a pro rata percentage.

8. Because of our foregoing conclusions and answers, we deem it unnecessary to further respond to your eighth question.

As previously indicated, we have concluded that the Governor may not veto an appropriation bill for free public schools. Article IV, Section 26, Constitution of Missouri, 1945.

A similar prohibition did not exist in the Constitution of 1875. Article V, Section 13 of that Constitution provided:

"If any bill presented to the Governor contains several items of appropriation of money, he may object to one or more items while approving other portions of the bill. In such case he shall append to the bill, at the time of signing it, a statement of the items to which he objects, and the appropriations so objected to shall not take effect. If the general assembly be in session, he shall transmit to the House in which the bill originated a copy of such statement, and the items objected to shall be separately reconsidered. If it be not in session, then he shall transmit the same within thirty days to the office of Secretary of State, with his approval or reasons for disapproval."

Subsequently, an amendment of that provision was proposed by initiative petition. At the general election of November 8, 1932, that constitutional amendment was adopted. Laws, 1933, Page 480.

"Constitutional Amendment No. 3. Submitted by initiative petition. -- Repealing Section 13,

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Article 5 and adopting a new Section 13, in lieu thereof. An amendment providing for an itemized executive budget of estimated revenue and recommended expenditures to be submitted to the general assembly within fifteen days after it convenes, and permitting the Governor, except in the case of appropriations for free public school purposes, to approve some items in an appropriation bill and object to others, and providing for the transmittal thereof, together with his reasons for disapproval of the rejected items, to the House in which the bill originated, if it be in session, or within thirty days to the office of the Secretary of State.

"For Constitutional Amendment No. 3, 931,429; against, 213,667.

"The full text of this constitutional amendment, as adopted at the November 8, 1932, election, is as follows:

"Section 1. Repealing and reenacting Section 13, Article V, --That Section 13, Article V, of the Constitution of Missouri is hereby repealed, and a new section adopted in lieu thereof, to be known as Section 13, and to read as follows:

"Sec. 13. Executive budget -- contents -- submission to legislature. -- The Governor shall, not later than fifteen days after the convening of the General Assembly in each biennial session, submit a budget showing estimated available revenues of the state for the ensuing biennium and recommending a complete plan of expenditures. All recommended expenditures and appropriations shall be itemized. If any bill presented to the Governor contains several items of appropriation of money, he may object to one or more items or portions of items while approving other portions of the bill. In such case he shall append to the bill, at the time of signing it, a statement of the items, or portions of items, to which he objects, and the appropriations, or portions thereof, objected to shall not take effect. If the General Assembly be in session, he shall transmit

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to the house in which the bill originated a copy of such statement, and the items or portions thereof objected to shall be separately reconsidered. If it be not in session, then he shall transmit the same within thirty days to the office of the Secretary of State, with his approval or reasons for disapproval. Provided, however, nothing herein contained shall be construed as authorizing the Governor to reduce any appropriation for free public school purposes."

These constitutional provisions evolved as our present constitutional provision, Article IV, Section 26, which provides as follows:

"The governor may object to one or more items or portions of items of appropriation of money in any bill presented to him, while approving other portions of the bill. On signing it he shall append to the bill a statement of the items or portions of items to which he objects and such items or portions shall not take effect. If the general assembly be in session he shall transmit to the house in which the bill originated a copy of the statement, and the items or portions objected to shall be reconsidered separately. If it be not in session he shall transmit the bill within forty-five days to the office of the secretary of state with his approval or reasons for disapproval. The governor shall not reduce any appropriation for free public schools, or for the payment of principal and interest on the public debt." (Emphasis ours).

Our conclusion in this respect is supported by the constitutional debates. We should note that at the time of the adoption of this constitutional provision, that the legislature had historically appropriated funds for free public schools by appropriation bills which authorized payment into the State School Moneys Fund a percentage of the state revenue. Subsequently, funds for free public schools were appropriated by bills which provided for a lump sum amount to be paid into the State School Moneys Fund in addition to a stated percentage of state revenue. It is apparent that the delegates to the Constitutional Convention did not contemplate appropriations to the State School Moneys Fund other than by the appropriation of a stated percentage of the state revenue. However, the language of the constitutional provision, ". . . the Governor shall not reduce any appropriation for free public schools, or for the

Honorable Warren E. Hearnnes

payment of principal and interest on the public debt" is clear and unambiguous so that its interpretation and effect is not altered by any deviation from the historical method in appropriating funds for free public schools.

The debates relevant to this issue involve Sections 5 and 6, relating to the budget system as recommended by the committee.

Section 5, as originally submitted to the Convention, provided:

"If any bill presented to the Governor contained several items of appropriation of money, he may object to one or more items or portions of items while approving other portions of the bill. In such case he shall append to the bill, at the time of signing it, a statement of the items, or portions of items, to which he objects and the appropriations, or portions thereof, objected to shall not take effect. If the General Assembly be in session he shall transmit to the House in which the bill originated a copy of such statement and the items, or portions thereof, objected to shall be separately reconsidered. If it be not in session then he shall transmit the same within thirty days to the office of the Secretary of State with his approval or reasons for disapproval. Provided, however, nothing herein contained shall be construed as authorizing the Governor to reduce any appropriation for free public school purposes nor for the payment of principal and interest on the public debt." (Page 2420)

Section 6, as submitted to the Convention, provided:

"The Governor shall have authority to reduce expenditures of state departments, offices and agencies under the amount of the appropriations actually made whenever actual revenues fall below the revenue estimates upon which the appropriations were based and through allotments or otherwise to control the rate at which such appropriations are expended during the fiscal year." (Page 2420)

Mr. McCluer, speaking in support of the sections offered, stated:

". . . We . . . adopted what might be described as an executive budget, the chief responsibility

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for the budget being placed upon the Governor. We believe . . . that the type of budget in which the executive has chief responsibility is the better financial control for the state, and we believe, therefore, that that type of budgetary control should be set up in the Constitution. You will find then, that this section freezes into the Constitution a system of executive budget control very much in accord with the present system of budgetary control in the State of Missouri." (Page 2421)

Adoption of Section 5 occurred only after considerable debate and a proposed amendment to that section had been defeated. When Section 5 was submitted to the Convention for their consideration, the following discussion occurred:

"MR. JULIAN: Doctor, in Section 5 beginning in line 14, I notice that the Committee has put in there that the Governor cannot reduce any appropriation for public schools or for the payment of principal and interest on the public debt. I notice that public schools provision is copied from the last lines of Section 13 of Article 5.

* * *

"Mr. Julian: And you are blocking out two things in the State of Missouri Government that says the Governor can't do, but you are giving his [sic] authority to approve or disapprove?

"MR. MC CLUER: That is right, Mr. Julian."
(Pages 2422-2423)

Thereafter, an amendment was offered which deleted from Section 5 the words "for free public school purposes nor" (Page 2424). The adoption of the amendment was moved and seconded and discussion was then had on the amendment (Page 2424);

"MR. DAMRON: I offer it for the reason that I can see no reason why there should be an exception made with respect to the power of the Governor to reduce appropriations even for school purposes. It has been the policy of the Legislature of this state from time immemorial to appropriate a third of the revenues for educational purposes going beyond

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the constitutional limit which requires appropriations of at least twenty-five per cent.

"I also offer it for the purpose of bringing this section into harmony with the section, with Section 11, File 16 of the Executive Department. I think there might be occasions, at times, when it might be practical for the Governor to have the power to reduce appropriations for school purposes. . . . (Page 2424)

* * *

"MR. LINDSAY: . . . Do you, Mr. Damron, see any difference in appropriations made for the public schools and that that is made for other departments? (Page 2425)

* * *

"MR. LINDSAY: . . . I mean if the other department had a certain lump sum appropriated to it and the funds didn't come in, there might be some reason for the Governor cutting those appropriations later on, whereas the school appropriation being a per cent appropriation merely cuts itself without any action on the part of the governor, doesn't it?

"MR. DAMRON: Well, it might. I can see how that would be true.

"MR. LINDSAY: Well, why should the Governor then want to cut it twice?

"MR. DAMRON: He might think that the General Assembly appropriated too much for school purposes. (Pages 2425-2426)

* * *

"MR. DAMRON: I want to leave some discretionary power with the Governor for that that respect, in that matter, as well as others pertaining to appropriations. I don't want the Legislature to have the power under the pressure of the school lobby to run wild with the funds of this state. (Page 2426)

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* * *

"MR. HEMPHILL: . . . So we decided on the same figure, twenty-five per cent, and as Mr. Lindsay says, that is a percentage basis, not a total appropriation. And the Governor should not have any right to change the appropriation that is determined on the percentage basis by the Legislature. (Pages 2426-2427)

* * *

"MR. MC REYNOLDS: Mr. President, I am in hopes that the Damron amendment will be adopted. . . .

* * *

". . . I do not hesitate to say that no more valuable purpose could be accomplished in the expenditure of public funds that [sic] the expenditure for education but along with it I assert that along with all other expenditures, when you get to the budget system, there is no sound reason why your Budget Control Officers and Governor should not have the same discretion that he has in every other expenditure. . . .

* * *

". . . Now, I can see no sound reason, . . . why should you start out with a proposition that you cannot exempt them from the emergencies which the state government may be called upon to meet. . . . but on the other hand, when free government supports public education, the fiscal controls which apply to every other department of government on it, with like urgency, apply to the educational department. . . . (Pages 2427-2430)

* * *

"MR. JULIAN: . . . but I still say that you should vote for the Damron amendment for this reason. You say to the Governor of the State of Missouri that we are taking away from you your veto power over any appropriation for school purposes. I say to you that no delegate in a Constitutional Convention should say

Honorable Warren E. Hearnes

to the state executive that you're taking away the veto power . . . (Page 2432)

* * *

"MR. JULIAN: Because we are saying that you can veto everything else that the General Assembly passes except for school purposes and the interest in the bonds. (Page 2434)

* * *

"MR. MOORE: . . . Now, I point out that the Legislature of Missouri is best able to determine the needs of the free public schools of Missouri much better than the chief executive. I point out, . . . that in case such an emergency arises, the schools do meet their part of it because their revenue is decreased due to the fact that it is on a percentage basis. I cannot bring myself to believe that we should write anything into the Constitution that would place the free public schools of Missouri in the hands of one man and when you give one man the control of the purse strings you are giving him the control of the educational system. . . . (Page 2436)

* * *

"MR. HARGIS: . . . So far as giving that power to the Governor to reduce the appropriations I would very much disapprove of that. (Page 2437)

* * *

"MR. BROWN (OF CARROLL): The only question in your mind is as to whether the system of government should have power to veto those two items. Is that the only thing that is bothering you?

"MR. JULIAN: It is just fundamental that if we are going to give him veto power over any item we should give him the veto power over all items. (Page 2438)

* * *

Honorable Warren E. Hearnes

"MR. ALLEN: . . . But it seems to me that this provision which they are attempting to strike from Section 5, in my humble opinion is a very appropriate provision as a part of the limitation on the broad powers that we are extending to the Governor for partial vetoes. That section reads, Mr. President, 'Provided, however, nothing herein contained shall be construed as authorizing the Governor to reduce any appropriation for free public school purposes nor for the payment of principal and interest on the public debt.'

* * *

"Now, Mr. President, the Damron Amendment should be defeated for these two reasons. First it's a moral obligation to the state and properly belongs in the hands of the Legislature. Second, if we gave the Governor power to make piecemeal appropriations it would be entirely inconsistent with the provisions we have already adopted in the consideration of the Education File of this state. I am opposed to the Damron amendment. (Pages 2442-2443)

* * *

"MR. POTTER: . . . but I think the people of the state through the exercise of the democratic process in 1932 have created this exception and I think it is one which we should give heed to their advice given to us at that time in the adoption of this amendment which contained this restriction upon the item veto power insofar as it relates to the funds for free public schools. (Page 2447)

* * *

"MR. FORD: . . . The only criticism I have to make is that only about one-tenth of it threw any light on the subject and that is the constitutional right of the Governor to make this veto.

* * *

"Those unfortunates have the first claim on the state of Missouri, in my judgment. Suppose

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he assumes that \$200,000,000 will adequately care for them. He knows, to begin with that the public schools occupy a favored position because the Constitution itself appropriates twenty-five of that \$100,000,000 to the public schools. He has no control over the twenty-five millions of dollars. The Legislature has no control over it. He must fix his budget on the basis that he has but seventy-five millions of dollars to deal with for all other purposes, because that one twenty-five million he can't touch.

"Now, suppose he assumes that in as much as the twenty millions will adequately care for the hospitals and that so much money will take care of everything else, that in addition to that million, that twenty-five million, he can allow the public schools fifteen millions more, or suppose the Legislature makes that assumption on the basis of the budget, the estimate of the revenue that the Governor must submit to them. Suppose the Legislature assumes, well, we can appropriate \$15,000,000 more to the public schools and therefore they fix the appropriation to the public schools at 40% which would be forty millions of dollars on the debt.

"Now, suppose a contingency arises when the Governor is confronted with the situation that he is not going to have that \$75,000,000 that he thought he would have and that as a result he's only going to have fifteen million to take care of these unfortunates in the hospitals, if he still gives that forty million to the public schools. Now, I want someone to tell me why the Governor should be permitted to cut down the appropriation to the hospitals because he is not going to have as much money as he thought he was going to have. Why should he have the right to cut down that appropriation, but can't touch the fifteen million that was appropriated to the public schools? Why the schools, after being put in the favored position of \$25,000,000 of their money can't be touched, why they can't touch the other, that's the principle involved.

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"Now, if we want to leave it to the Legislature and say, 'The Governor shall not interfere at all with any of it,' then let's cut out the section that allows the Governor to reduce any appropriation to meet an emergency, but that's what it means. All in the world that section amounts to when you give that power to the Governor is that if the Governor finds himself and the state of Missouri in a situation that was not anticipated when his budget was presented to the Legislature and when the appropriation was made, he must reduce some appropriations to meet that emergency and if we don't want to give him that power to reduce any appropriation, let's cut it out altogether and not allow him to reduce the appropriations for state hospitals, but if we are going to make exceptions, I say that is the exception that should be made first of all. You're not making that exception.

"Now, will somebody explain to me on principles, and not site [sic] me to a lot of facts as to what they are doing in other states and how much school teachers are paid and all that, somebody explain to me on principles, why the Governor should be allowed to reduce the appropriations of the state hospitals and not be allowed to reduce the appropriations to public schools? That's what I want to hear somebody explain. (Pages 2447-2448)

* * *

"MR. PHILLIPS (OF ST. LOUIS CITY): I would like to attempt to answer Senator Ford on the question of principles. Now, in the first place, there's this difference between an appropriation for the support of the state hospitals and an appropriation for the public schools. When you appropriate for the state hospital you appropriate a certain given amount of money, but when you appropriate for the free public schools, you don't appropriate a definite sum, you appropriate a proper rate, a share of your income, no matter what your income is.

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"Now, if you shouldn't have as large an income as you anticipate in your budget, why you won't have the money to pay that definite sum that you have appropriated for the public institutions, but the reduction is taken care of automatically in the case of the public schools because it is a definite share, one-fourth or one-third or whatever it is, of the amount that comes in. I think you have answered your own argument when you said that the appropriation was not made by the General Assembly. It's made by the Constitution itself. That definite amount is appropriated by the Constitution and the Governor of this state shouldn't be permitted to veto the appropriation that's made by the people themselves any more than he should be allowed to veto the action of this Assembly, or this Convention on the new Constitution. (Pages 2448-2449)

* * *

"MR. LINDSAY: The free public schools receive and have been receiving thirty-three and one-third percent of the revenues of this state by legislative appropriations. The Governor has never had the power to reduce that appropriation as far as I know, in this state, at any time. It was the purpose of this provision that that power shall not be extended to the Governor now . . . (Pages 2449-2450)

* * *

"MR. HEMPHILL: . . . In Section 13 of Article 5, I believe it is, the Section winds up by reading this way, 'Provided however' and this is dealing with the budget and the powers of the Governor for veto etc., 'Provided however, nothing herein contained shall be construed as authorizing the Governor to reduce any appropriations for free public school purposes.' Now, that is a special amendment submitted to the people in 1932 and adopted at that time. I believe the Committee in considering that would hesitate a great deal to take that provision out of the Constitution. . . .

"Now then, I believe the people of the state also feel that this is a 'must' matter providing such a way that the Governor cannot veto

Honorable Warren E. Hearnes

appropriations for the public schools, and it is in the Constitution and it was put there by amendment. . . . So I hope very much that we will vote down Mr. Damron's amendment. (Page 2452)

* * *

"MR. DAMRON: . . . I said earlier that I offered this amendment for two purposes, to bring it in harmony with File No. 6, and because I could see no reason for making a discrimination with respect to the power of the Governor to veto when you came to matters pertaining to appropriations for education. . . . (Pages 2452-2453)

* * *

"Now, much of what I have said is beside the point here, the issue that is now before this Convention. If this principle of giving the Governor the right of 'I can veto' is good and sound and we have had it in this state for some years and I believe it is good and sound, then it certainly is sound and applicable as to the question of vetoing items of appropriation for educational system for educational purposes. I can't see any reason on earth for making the discrimination. . . .

"Now, I can't see, I can't see for the life of my why you should give the Governor the right to veto items affecting Eleemosynary and the penal institutions and the governmental functions of this state, the courts, the state officers' salaries, etc. and yet say that he shouldn't be allowed to exercise that right with respect to the appropriation for school purposes. (Pages 2453-2455)

* * *

"PRESIDENT: Result sixteen aye, thirty-eight no. The amendment fails. Are there other amendment to Section 5?" (Page 2455)

Thereafter, the amendment was defeated (Page 2455). Consequently, Sections 5 and 6 were adopted (Pages 2455-2456). Thus,

Honorable Warren E. Hearnnes

on the basis of the constitutional provision and the framers' intent as expressed in the constitutional debates, we conclude that the Governor may not veto all or any portion of an appropriation bill for free public schools, nor may he reduce any portion of an appropriation for public schools.

The next question presented is whether the Governor may control by allotment and thereby reduce the distribution of such funds. The issue to be resolved is whether the provision of Article IV, Section 26 prohibiting the Governor from reducing ". . . any appropriation for free public schools, . . ." applies only to an appropriation bill presented to the Governor for his approval or disapproval, or does that prohibition deprive him of authority to control the rate of or to reduce expenditures? We conclude the Governor may control the rate at which an appropriation for free public schools is expended during the period of the appropriation by allotment or other means.

There has been no judicial determination interpreting the two provisions and their relationship. Our conclusion is compelled by a common sense reading of the two provisions. Article IV, Section 26 specifically provides, in part:

"The governor shall not reduce any appropriation for free public schools, . . ."

Article IV, Section 27 uses not restrictive, but rather all inclusive language:

"The governor may control the rate at which any appropriation is expended during the period of the appropriation by allotment or other means, and may reduce the expenditures of the state or any of its agencies below their appropriations whenever the actual revenues are less than the revenue estimates upon which the appropriations were based." (Emphasis ours)

The use of the words "any appropriation" together with the failure to specifically exempt appropriations for free public schools from the operation of this section compels this conclusion.

The stated conclusion is consistent with the intent expressed in the constitutional debates.

"MR. JULIAN: My inquiry is this, Doctor. Say we have -- I noticed -- I make this further statement for the information of the members of the Convention that this provision about not

Honorable Warren E. Hearnes

reducing the school was adopted in 1932, the new provision in the present Constitution. Now, my inquiry is this: then in this Section 5 [sic] you did give the Governor the right to reduce appropriations when money is not available in the treasury for the various departments or the anticipated revenue does not come in for other things than the school or the payment of principal or interest on the public debt, isn't that right?

"MR. MC CLUER: Well, not quite, Mr. Julian, Section 6 deals on that point. Section 5 deals with the Governor's disapproval of the appropriation.

"MR. JULIAN: Oh, now Section 6 -- My point is this; under Section 6, now if the revenue does not come in, the anticipated revenue, he could keep and disapprove and hold back from the public schools just the same as any other part.

"MR. MC CLUER: On Section 6.

"MR. JULIAN: I know, but he could do it under Section 6. Under Section 5 there is a specific provision that you just read that he may not reduce the appropriations of the schools or for interest on public debt.

"MR. MC CLUER: He may cause disapproval of those items for appropriation. . . . (Page 2422)

* * *

"Mr. Julian: And you are blocking out two things in the State of Missouri Government that says the Governor can't do, but you are giving his [sic] authority to approve or disapprove?

"MR. MC CLUER: That is right, Mr. Julian. (Pages 2422-2423)

* * *

"MR. BROWN (OF CHRISTIAN): Doctor, in view of the provisions of Section 6, the Governor shall have authority to reduce expenditures in State

Honorable Warren E. Hearnes

departments, offices and agencies under the appropriations actually made whenever actual revenues fall below the revenue estimates upon the appropriations were based and through allotments or otherwise to control the rate at which such appropriations are expended during the fiscal year, do you not believe that the lines 14, 15, 16 and 17 are contradictory of Section 6 to some extent?

"MR. MC CLUER: No.

"MR. BROWN (OF CHRISTIAN): Why?

"MR. MC CLUER: Section 5 deals with the right of the Governor to disapprove an item on the appropriations calendar of the Legislature, to disapprove it, not because revenues fall below and it would be necessary to pay it, but because he disapproves that action. Section 6 deals with the lack of revenue when the revenues fall below the estimates upon which the appropriations were based. Section 5 deals with the Governor's discretionary power in this budgetary system, this budget system. (Page 2423)

* * *

"MR. DAMRON: With reference to the provision in line 16 of Section 5 to which Mr. Julian called your attention, that would prohibit the Governor from reducing the appropriation for school purposes. Did you notice that there is conflict in that respect with Section of File Number 16?

"MR. MC CLUER: Yes, sir.

"MR. DAMRON: On the Executive Department?

"MR. MC CLUER: Yes, sir.

"MR. DAMRON: The Executive Department section would permit the Governor to reduce the appropriation for school purposes.

"MR. MC CLUER: That is right, sir." (Pages 2423-2424)

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Therefore, we conclude that the Governor may control by allotment or other means, and reduce the expenditure below the appropriation whenever the actual revenues are less than the revenue estimates upon which the appropriations are based, consistent with our previous opinion. Opinion of the Attorney General No. 407, issued to the Honorable Warren E. Hearnes, December 18, 1966 (copy enclosed).

You also inquire whether "control of expenditure rates apply as to any single appropriation without being required to reduce other other appropriations by the same percentage?" The applicable constitutional provision, Article IV, Section 27, Constitution of Missouri, 1945, provides:

"The governor may control the rate at which any appropriation is expended during the period of the appropriation by allotment or other means, and may reduce the expenditures of the state or any of its agencies below their appropriations whenever the actual revenues are less than the revenue estimates upon which the appropriations were based."

It is apparent this provision contains no restrictions as to the manner in which the Governor shall control the rate at which any appropriation is expended, and by the use of the language "any," we conclude that the Governor may control the expenditure rates of a single appropriation without being required to reduce all appropriations by a pro rata percentage.

We have concluded that "revenue estimates upon which appropriations were based" refers to the official estimates presented to the General Assembly by the Executive budget, except in these instances in which the General Assembly has by its appropriation bill set forth its estimates of revenues for the period during which the appropriation was made. However, when appropriations are made by the Legislature in excess of the estimated revenue as set forth in the Executive's budget message and without specifying the estimated revenues in the appropriation bill, it is our opinion that the total amount of such legislative appropriations represents the revenue estimates upon which appropriations were based.

Article III, Section 37 of the Missouri Constitution provides:

"The general assembly shall have no power to contract or authorize the contracting of any liability of the state, or to issue bonds therefor, except . . ."

Honorable Warren E. Hearnes

Article IV, Section 28 of the Missouri Constitution provides:

"No money shall be withdrawn from the state treasury except by warrant drawn in accordance with an appropriation made by law, nor shall any obligation for the payment of money be incurred unless the comptroller certifies it for payment and certifies that the expenditure is within the purpose of the appropriation and that there is in the appropriation an unencumbered balance sufficient to pay it. . . ."

The courts have consistently adhered to the principle that it will be presumed the Legislature acted consistent with its constitutional authority and limitations. Therefore, assuming that the Legislature is acting in compliance with the constitutional provisions, we would then conclude that the total amount of the appropriations as passed by the Legislature, unless otherwise specifically stated in an appropriation act, represents the estimated revenue.

In your opinion request, you made specific reference to the veto message of Governor Donnelly which is recorded at Page 35 of the 1953 Session Laws of the 67th General Assembly. We deem it appropriate to consider that veto, the applicable statutory provisions and the litigation which ensued as a result thereof.

The 67th General Assembly, in its appropriations bill, House Bill No. 324, provided:

"Section 2.250. One-third of General Revenue Fund set aside for the State School Moneys Fund.-- The state comptroller is hereby authorized and directed to set aside one-third (1/3) of the state revenue paid into the state treasury for the period beginning July 1, 1953, and ending June 30, 1955, into a fund to be known as the state school moneys fund; the same to be used for the support of the free public schools.

"Section 2.255. Support of free public schools -- Postwar Reserve Fund.-- There is hereby appropriated out of the state treasury chargeable to the Postwar Reserve Fund, the sum of Nine Million Two Hundred Fifty Thousand Dollars (\$9,250,000.00) to be paid into the state school moneys fund; the same to be used for the support of the free public schools; said sum to be apportioned and distributed for the support of free public schools, as provided by law, for the period beginning July 1, 1953, and ending June 30, 1955."

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The Governor's veto was with respect to Section 2.255. Laws, 1953, Pages 35-37.

Thereafter, two petitions for writs of mandamus were filed in the Supreme Court of Missouri on January 12, 1954. Both petitions sought to compel distribution of the Nine Million Two Hundred Fifty Thousand Dollars (\$9,250,000) appropriated by the Legislature from the Postwar Reserve Fund to the State School Moneys Fund under Section 2.255, Laws, 1953, Page 35. At issue was the Governor's veto of Section 2.255, House Bill No. 324. See: State of Missouri ex rel. Springfield Reorganized School District No. 12 of Greene County, Missouri, a corporation, Relator, v. Mrs. True (Helen) Davis, et al., as Members of the State Board of Education of Missouri; Newton Atterbury, Comptroller of the State of Missouri; Haskell Holman, State Auditor of the State of Missouri, and G. H. Bates, State Treasurer of the State of Missouri, Respondents, No. 44197; and State of Missouri ex rel. The Board of Education of the City of St. Louis, Missouri, a corporation, Relator v. Mrs. True (Helen) Davis, et al., as Members of the State Board of Education of Missouri, Neil Atterbury, Comptroller of the State of Missouri, Haskell Holman, State Auditor of the State of Missouri, and G. H. Bates, State Treasurer of the State of Missouri, Respondents, No. 44198.

One of the allegations contained in the petitions was:

"That the action of the Governor in attempting to veto and disallow Section 2.255 of House Bill No. 324 was a nullity and constitutes no bar to the appropriation contained in said section, for the reason that it was an attempt to reduce an appropriation made by the General Assembly for the free public schools in violation of Section 26 of Article IV of the Constitution of the State of Missouri. . ."

The constitutional provisions considered in that proceeding are the same as are here in question. (Article IV, Section 26). However, the statutory provisions considered in that proceeding have since been amended. Section 26.030, RSMo 1949, provided:

"The governor may veto any item or portion of any item of any appropriation bill or the whole thereof, provided, however, that as to appropriations made for free public school purposes or for the payment of principal and

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interest on the public debt, the governor may approve or veto such appropriations, but shall not have power to reduce any such appropriation."

The history of this section indicates that after the adoption of the constitutional amendment on November 8, 1932, Senate Bill No. 227, establishing an executive budget system, was adopted. Laws, Missouri, 1933, Page 459, et seq. Section 11 thereof provides:

"The governor may veto any item or portion of any item of any appropriation bill or the whole thereof, provided, however, that as to appropriations made for free public school purposes, the governor may approve or veto such appropriations, but shall not have power to reduce any such appropriation." Laws, Missouri, 1933, Page 462

This provision was contained in the Revised Statutes of Missouri, 1939, as Section 10905, and continued in this form until 1945. The provision was amended to provide:

"The governor may veto any item or portion of any item of any appropriation bill or the whole thereof: Provided, however, that as to appropriations made for free public school purposes or for the payment of principal and interest on the public debt, the governor may approve or veto such appropriations, but shall not have power to reduce any such appropriation." Laws, Missouri, 1945, §58, at Page 1447

This provision was amended in 1959. House Bill No. 121, Sixty-fifth General Assembly, repealed Section 26.030, and enacted in lieu thereof a new section which provided:

"The governor may veto any item or portion of any item of any appropriation bill or the whole thereof; except that the governor shall not reduce any appropriation for free public schools or for the payment of principal and interest on the public debt." Laws, Missouri, 1959, House Bill No. 121, Section 1

Any possible conflict between the constitutional limitations imposed upon the Governor by Article IV, Section 26 of the Constitution of Missouri, 1945, and authority granted to him by Section 26.030, RSMo 1949, has been eliminated by the amendment of that section in 1959.

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The court, in its order denying the petitions for alternative writs of mandamus, stated:

"The petition for an alternative writ of mandamus is denied. The alternative writ is refused because no clear, definite and certain right to the relief sought can be shown in view of the admitted facts. It is further apparent that the Governor's express veto and disapproval of the \$9,250,000 appropriation provided by Sec. 2.255 of House Bill No. 324, even if the invalidity of the veto be conceded, could never be construed as an approval of Sec. 2.255, so as to make the section effective as a law since the General Assembly had then adjourned. Nor could said section of said bill be construed as having become a law under Secs. 31, 32, or 33 of Article 3 of the Constitution, nor under Section 26, of Article 4, in view of the Governor's designation of said section as being 'specifically vetoed and not approved,' the General Assembly having previously adjourned. For the above and other reasons, it is clear to the Court that a peremptory writ of mandamus should not issue in any event and that the issuance of an alternative writ at this time would only result in delay and further expense to the litigants without any resulting benefit to the complaining school districts. The alternative writ of mandamus is accordingly denied."

Thus it would appear that even though a Governor may not constitutionally veto an appropriation for free public schools, his failure to specifically approve the appropriation bill will prevent it from becoming law absent compliance with either Section 31, 32 or 33 of Article III of the Constitution of Missouri.

Article III, Section 31 of the Constitution of Missouri, 1945, provides:

"All bills and joint resolutions passed by both houses shall be presented to and considered by the governor, and within fifteen days after presentation he shall return them to the house of their origin endorsed with his approval or accompanied by his objections. If the bill be approved by the governor, it shall become law.

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When the general assembly adjourns, or recesses for a period of thirty days or more, the governor may return within forty-five days any bill or resolution to the office of the secretary of state with his approval or reasons for disapproval."

Article III, Section 32 of the Constitution of Missouri, 1945, provides as follows:

"Every bill presented to the governor and returned with his objections shall stand as reconsidered in the house to which it is returned. The objections of the governor shall be entered upon the journal and the house shall proceed at its convenience to consider the question pending, which shall be in this form: 'Shall the bill pass, the objections of the governor thereto notwithstanding?' The vote upon this question shall be taken by yeas and nays and if two-thirds of the elected members of the house vote in the affirmative the presiding officer of that house shall certify that fact on the roll, attesting the same by his signature, and send the bill with the objections of the governor to the other house, in which like proceedings shall be had in relation thereto. The bill thus certified shall be deposited in the office of the secretary of state as an authentic act and shall become a law."

Article III, Section 33 of the Constitution of Missouri, 1945, provides as follows:

"Whenever the governor shall fail to return a bill presented to him as required by this Constitution, the general assembly by joint resolution reciting the fact of such failure and the bill at length, may direct the secretary of state to enroll the bill as an authentic act and it shall become a law, provided, that such joint resolution shall not be submitted to the governor for his approval."

That decision would be applied to the principles hereinbefore set forth in the following manner.

The Missouri Constitution provides that a bill shall become law in one of three ways.

Honorable Warren E. Hearnes

(1) Passage by both houses of the General Assembly and approval by the Governor within 15 days after presentation to him.

(2) Passage by both houses of the General Assembly, veto by the Governor within 15 days after presentation to him and re-passage by both houses of the General Assembly by a two-thirds majority.

(3) Passage by both houses of the General Assembly, failure of the Governor to return the bill within 15 days after presentation to him (or within 45 days if the General Assembly adjourns for more than 30 days) and a joint resolution of the General Assembly directing the Secretary of State to enroll the bill.

As previously stated, the Governor may not constitutionally veto, all or any part, of an appropriation for free public schools, nor may he reduce such an appropriation. However, if the Governor should attempt to veto, all or any part, of an appropriation, or attempt to reduce such an appropriation, the effect of such constitutionally impermissible action would be that the bill did not receive his approval and therefore did not become law. In such a situation the bill could become law only upon joint resolution by the General Assembly reciting the failure of the Governor to approve and sign the appropriation bill and directing the Secretary of State to enroll the bill as an authentic act. Article III, Section 33, Constitution of Missouri, 1945.

Because we have determined that the Governor may not constitutionally veto, all or any part, of an appropriation for free public schools, nor may he reduce such an appropriation, it is unnecessary for the General Assembly to comply with the requirements of Article III, Section 32 of the Constitution of Missouri, 1945, regarding passage of bills by the General Assembly over the Governor's veto.

CONCLUSION

Therefore, it is our opinion:

1. That the Governor may not constitutionally veto an appropriation bill for free public schools.

2. That the Governor may not constitutionally veto any portion of an appropriation bill for free public schools.

3. That the Governor may not reduce any portion of an appropriation for public schools.

4. That the Governor, at his discretion, may constitutionally control by allotment or other means and thereby reduce the expendi-

Honorable Warren E. Hearnnes

ture of funds below their appropriations only when the actual revenues are less than the revenue estimates upon which the appropriations were based.

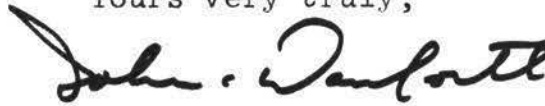
5. The phrase "not reduce" for free public schools, as found in Article IV, Section 28, Constitution of Missouri, 1945, is a prohibition against executive reduction of any amount appropriated by the Legislature to free public schools.

6. The phrase "revenue estimates upon which appropriations were based" refers to those amounts as set forth in the budget submitted to the General Assembly, except in those instances in which the General Assembly has by its appropriation bill, set forth its estimate of revenues for the period during which the appropriation was made, or, if not specifically stated in the appropriation bills, then the total of the appropriations as passed by the Legislature, would represent the estimated revenue upon which appropriations were based.

7. That the Governor may control the expenditure rates without being required to reduce all appropriations by a pro rata percentage.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Gene E. Voigts.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 407
12-9-66, Hearnnes

Attorney General of Missouri

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JOHN ASHCROFT
ATTORNEY GENERAL

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March 28, 1983

ADDENDUM
OPINION NO. 340-70

The Honorable Christopher S. Bond
Governor of Missouri
Executive Office
State Capitol Building
Jefferson City, Missouri 65101

Dear Governor Bond:

This constitutes an addendum to Opinion No. 340 issued to the Honorable Warren E. Hearnes on May 22, 1970, and affecting the powers of the office of the governor. Among other questions posed to this office in the request for that opinion was the following:

4. May the governor control by allotment and thereby reduce the distribution of such funds [to the public schools]?

The answer to the inquiry was stated so:

4. That the governor, at his discretion, may constitutionally control by allotment or other means and thereby reduce the expenditure of funds below their appropriations only when the actual revenues are less than the revenue estimates upon which the appropriations were based.

Article IV, Section 27, Missouri Constitution, provides:

The governor may control the rate at which any appropriation is expended during the period of the appropriation by allotment or other means, and may reduce the expenditures of the state or any of its agencies below their appro-

The Honorable Christopher S. Bond

priations whenever the actual revenues are less than the revenue estimates upon which the appropriations were based.

At the outset, that section appears to address two entirely separate controls--one relating to limiting the rate of spending and the other directed to restricting the total amount spent by any agency over the fiscal period.

Considering the latter power first, the governor is able to "reduce . . . expenditures . . . below . . . appropriations" in appropriate circumstances. Granting those words their clear and usual meanings, at least two possibilities regarding the exercise of the power suggest themselves. Specifically, the governor may consider the appropriations to any agency in the aggregate and simply reduce the departmental spending ceiling. Second, it is quite logical to extend that power to include a determination that agency spending from a specific appropriation must be reduced in case of a shortfall. Such an interpretation is consistent, in the opinion of this office, with the line item veto authority which is granted to the governor in the preceding section. It would go no further than to preserve the power of the executive to tailor the budget when necessary in case of a revenue shortfall to the same extent as was the case when submitted to him for approval originally.

The second control relates to restricting "the rate at which any appropriation is expended during the period of the appropriation by allotment or other means. . . ." The language suggests that the quarterly allotments outlined in Section 33.290 constitute but one method of rate control. Presumably, any method might be used, although the usual construction would limit the alternatives to those which are similar in nature to the allotment process according to the rules of ejusdem generis.

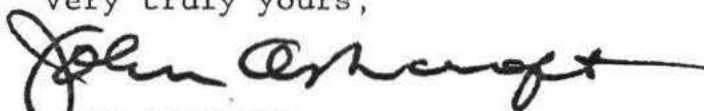
In light of these two separate powers, it should not be inferred from any portion of Opinion No. 340 that the constitutional authority to control the rate of expenditure is contingent upon the existence of a shortfall in revenues or that an action to control the spending rate of any agency must necessarily be linked to a reduction in the amount available to the agency for the entire fiscal year. Those controls might be exercised simultaneously, but need not be.

Accordingly, the opinion of this office with respect to the question posed by Governor Hearnest and quoted above may be restated as follows:

The Honorable Christopher S. Bond

4. That the governor, at his discretion, may constitutionally control the rate of expenditure of any appropriation through any fiscal year by allotment or other means. Furthermore, in any year in which actual revenues are less than the revenue estimates upon which appropriations were based, the governor, at his discretion, may reduce the expenditures of any agency below the amounts appropriated to the agency.

Very truly yours,

A handwritten signature in black ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

ELECTIONS:
ABSENTEE VOTING:
BALLOTS:

1. The terms "nonpartisan" and "independent" as applied to candidates for office, are synonymous and when necessary for a ballot to be furnished

at a primary election at which independent or nonpartisan candidates are running, such ballot is a "nonpartisan" ballot. 2. Nonpartisan ballots are not to be furnished at a primary election where there is not more than one candidate for any office on the nonpartisan ticket if such ticket did not receive more than 5% of the vote for governor at the last preceding election for governor unless 10% of the voters voting at the last preceding election for governor petition for a ballot. 3. War ballots do not contain a nonpartisan column when there is not more than one candidate for any office on the nonpartisan ticket if such ticket did not receive more than 5% of the vote for governor at the last preceding election for governor unless prior to the printing of the war ballots 10% of the voters voting at the last preceding election for governor petition for a ballot. 4. An individual who receives a nonpartisan ballot at a primary election cannot receive a party ballot at such primary election.

OPINION NO. 342

May 22, 1970

Honorable James C. Kirkpatrick
Secretary of State
State of Missouri
Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Kirkpatrick:

This is in answer to your request for an official opinion in which you asked whether absentee ballots, including absentee war ballots, or ballots to be used at the polling places at the August 1970 primary are to be printed for "nonpartisan or independent" candidates in view of the fact that not more than one nonpartisan or independent candidate has filed for any office. Your questions are as follows:

"1. Is there a distinction in fact or in law between the terms 'Independent' and 'Nonpartisan' and, if so, must ballots be prepared for both classifications?

"2. Must ballots be prepared for Independent or Nonpartisan candidates, or both in the August 4, 1970, Primary Election, without regard to the exemptions stated in Section 120.430 R.S.Mo., 1959?

Honorable James C. Kirkpatrick

"3. Must the War Ballot prepared pursuant to Sec. 112.330 V.A.M.S. Cum. Sup. 1969-1970 include candidates appearing on either the Independent or Nonpartisan tickets, or both.

"4. May a voter requesting the Independent or Nonpartisan ballot in the August Primary vote for other officers and any other party Primary?"

In answer to your first question, it is our view that the terms "independent" and "nonpartisan" are synonymous and that reference to an independent ticket means and includes a nonpartisan ticket, and a reference to a nonpartisan ticket means and includes an independent ticket.

Section 120.215, Senate Bill No. 135 of the Seventh-fifth General Assembly provides as follows:

"Any person desiring to file declaration papers or propose as a candidate on any independent, nonpartisan or new political party ticket, who does not announce by declaration papers as a candidate for any political party as defined by sections 120.300 to 120.650 and is not a member of a political party having a state and county committee, or treasurer thereof, shall pay the sum of money required by section 120.350 to the state or county treasurer, as the case may be, instead of to the treasurer of a state or county central committee, take a receipt therefor and file the receipt with his declaration papers, and that sum of money so paid shall go into the general revenue fund of the state or county."

Section 120.450, Senate Bill No. 135 of the Seventy-fifth General Assembly provides in part as follows:

"1. At all primary elections there shall be as many separate ballots as there are parties entitled to participate in the primary election. There shall also be a nonpartisan ballot upon which, under appropriate title of each office, shall be printed the names of all persons by whom declaration papers have been filed as required by sections 120.300 to 120.650 who

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do not announce by such declaration papers
as candidates for any political party as
defined by sections 120.300 to 120.650 .

. . ."

We believe it is to be clear, as stated above, that the terms "nonpartisan" and "independent" are synonymous and that both have the meaning of a candidacy that is not "partisan", that is, a candidacy that is not that of an established political party or a new political party. It is clear, that if a person is running as a candidate other than as a "Party" candidate, he is a nonpartisan or an independent candidate. We believe it to be clear also under the provisions of Section 120.450, quoted above, providing for the furnishing of ballots, including party ballots and a "nonpartisan" ballot at primary elections, that the legislative intent is shown to be that the "nonpartisan" ballot is also intended to include the "independent" ballot and that the nonpartisan and independent ballots are one and the same. It follows, therefore, that where it is necessary to prepare an "independent" or "nonpartisan" ballot, that only one ballot is to be prepared and that such ballot is a "nonpartisan" ballot under the provisions of Section 120.450.

We are enclosing in answer to your second question, Opinion No. 287, rendered May 27, 1968, to James C. Kirkpatrick. Such opinion relies on and quotes from the case of State v. Toberman, 269 S.W.2d 753, decided by the Supreme Court of Missouri in 1954. As can be seen from the quotation from such case in Opinion No. 287, the Supreme Court held that it is unnecessary to print a "nonpartisan" primary ballot if there are no contests for any office on the nonpartisan ticket and such ticket did not receive more than 5% of the vote for governor at the last primary election for governor unless 10% of the voters voting at the last preceding election for governor petition for a ballot.

Section 120.430, RSMo 1949, in effect at the time the Toberman case was decided provided as follows:

"Whenever any person shall have filed as a candidate for nomination upon a party ticket which at the last preceding election for governor shall have cast less than five per cent of the total vote cast for governor in such election, and when not more than one person shall have filed as a candidate for any office on such party ticket, no ballot shall be printed for the primary election as herein provided unless upon petition of at least ten per cent of the voters voting in the county at said preceding election for governor.

Honorable James C. Kirkpatrick

When no ballots are printed as herein provided, the candidates filing declarations and who are unopposed shall be certified, as by sections 120.300 to 120.650 provided, as the nominees of such party casting less than five per cent of the vote of the state."

Section 120.450, RSMo 1949, also in effect at the time the Toberman case was decided provided in part as follows:

"At all primaries there shall be as many separate tickets as there are parties entitled to participate in the primary election. There shall also be a non-partisan ticket upon which, under appropriate title of each office, shall be printed the names of all persons by whom declaration papers have been filed, as required by sections 120.300 to 120.650, who do not announce by such declaration papers as candidates for any political party as defined by sections 120.300 to 120.650. . . ."

It can be seen from the quotation in the Toberman case in Opinion No. 287, that at the time the Supreme Court made its ruling the provisions of Section 120.450, RSMo. 1949, provided for a non-partisan ballot in addition to the ballots for the parties entitled to participate in the primary election. In view of the holding of the Supreme Court in the Toberman case, it is clear that the Supreme Court was of the view that the provision in Section 120.450, requiring a nonpartisan ticket at primary elections was subject to the provision of Section 120.430, which states that it shall be unnecessary to furnish a nonpartisan ballot at a primary when not more than one candidate for any office has filed on the nonpartisan or independent ticket and such ticket did not receive more than 5% of the vote for governor at the last preceding election for governor unless 10% of the voters voting at the last preceding election for governor petition for a ballot.

The provisions of 120.430 and 120.450, Senate Bill No. 135 of the Seventy-fifth General Assembly, are the same in substance as were such sections in the 1949 revision, and we believe, therefore, that the Supreme Court holding in the Toberman case is applicable at the present time.

It is, therefore, our view in answer to your second question that under the provisions of Section 120.430, Senate Bill No. 135

Honorable James C. Kirkpatrick

of the Seventy-fifth General Assembly, it is unnecessary to furnish nonpartisan or independent ballots where not more than one candidate has filed for any office on the nonpartisan or independent ticket, when such party did not receive more than 5% of the vote for governor at the last preceding election for governor unless 10% of the voters voting at the last preceding election for governor petition for a ballot.

In answer to your third question, it is our view that the war ballot should not include candidates on the nonpartisan or independent ticket in cases where there is not more than one candidate for any office on such ticket and such ticket received at the last election for governor, less than 5% of the vote unless before such ballots are printed 10% of the voters voting at the last preceding election for governor petition for a ballot.

Section 112.330, House Bill No. 54 of the Seventy-fifth General Assembly, relating to war ballots provides in part as follows:

" . . . The form and contents of the ballot shall comply with the primary and general election laws, except as to the instructions required to be placed on primary and general election ballots, and except that the ballot for primary elections for all parties shall consist of a single sheet of paper . . . "
[Emphasis added]

It is our view that the provision in Section 120.430 that a ballot shall not be furnished for a nonpartisan ticket for primary elections when there is not more than one candidate for any office on the independent or nonpartisan ticket if such ticket got less than 5% of the vote at the last election unless 10% of the voters voting at the last preceding election for governor petition for a ballot is part of the primary election laws, and therefore, it is unnecessary to print war ballots when not more than one candidate files on the nonpartisan or independent ticket for any office and such ticket did not receive more than 5% of the vote at the preceding election for governor unless before the ballots are printed 10% of the voters voting at the last preceding election for governor petition for a ballot.

We interpret your fourth question as asking whether a person who receives an independent or nonpartisan ballot at the primary election in August is entitled to receive in addition a party ballot.

Section 120.450, Senate Bill No. 135 of the Seventy-fifth General Assembly, quoted above, provides that at all primary

Honorable James C. Kirkpatrick

elections there shall be as many separate ballots as there are parties entitled to participate in the primary election and also a nonpartisan ballot. As pointed out above in certain circumstances it is unnecessary to furnish a nonpartisan or independent ballot. However, when there is more than one candidate for any office as an independent or nonpartisan candidate a nonpartisan ballot is furnished giving the voters the right to determine by vote the nominee for any office on the nonpartisan ticket.

Subsection 7 of Section 120.450 provides in part as follows:

"In any primary election each qualified voter shall be entitled to receive from the judge of the election one ballot of the political party participating in the election for which he desires to vote. . . ."

While subsection 7 of section 120.450 provides that each qualified voter shall be entitled to receive the ballot of the political party for which he desires to vote, we believe that the clear legislative intent is that the individual shall be entitled to vote only one ticket at the primary election, whether such ticket be a party ticket or a nonpartisan ticket. Subsection 1 of Section 120.450 provides that there shall be party ballots for established and new political parties and nonpartisan ballots and we believe it to be clearly the legislative intent that any individual receive only a party ballot or a nonpartisan ballot and that he cannot participate in voting for candidates for more than one party or for candidates on a nonpartisan ticket, and, in addition candidates on a party ticket. We deem it unnecessary to determine whether a statute would be constitutional which provided that a person would be entitled to more than one party ballot or a party ballot and a nonpartisan ballot because the legislative intent is clearly that any individual shall be entitled to receive only a party ballot or a nonpartisan ballot at a primary election.

CONCLUSION

It is the opinion of this office that:

1. The terms "nonpartisan" and "independent" as applied to candidates for office, are synonymous and when necessary for a ballot to be furnished at a primary election at which independent or nonpartisan candidates are running, such ballot is a "nonpartisan" ballot.

2. Nonpartisan ballots are not to be furnished at a primary election where there is not more than one candidate for any office

Honorable James C. Kirkpatrick

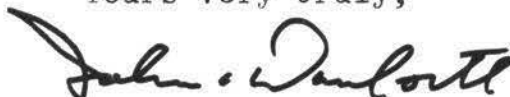
on the nonpartisan ticket if such ticket did not receive more than 5% of the vote for governor at the last preceding election for governor unless 10% of the voters voting at the last preceding election for governor petition for a ballot.

3. War ballots do not contain a nonpartisan column when there is not more than one candidate for any office on the nonpartisan ticket if such ticket did not receive more than 5% of the vote for governor at the last preceding election for governor unless prior to the printing of the war ballots 10% of the voters voting at the last preceding election for governor petition for a ballot.

4. An individual who receives a nonpartisan ballot at a primary election cannot receive a party ballot at such primary election.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, C. B. Burns.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosure:

Op. No. 287
5-27-68, Kirkpatrick

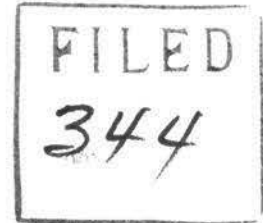
FOREST CROP LAND:
TAXATION (EXEMPTION):

Article X, Section 7 of the Constitution of Missouri does not permit the Legislature to grant partial relief from taxation of forest crop land for a period longer than twenty-five years or to extend or renew such classification of forest crop land beyond a period of twenty-five years.

OPINION NO. 344

October 28, 1970

Honorable Earl L. Sponsler
State Representative
District No. 126
R.F.D. 2
Cabool, Missouri 65689



Dear Representative Sponsler:

This is in response to your request for an official opinion on the question whether land which has been classified as forest crop land under the State Forestry Act and has received partial relief from taxation for twenty-five years may again be classified as forest crop land for an additional twenty-five years.

As pointed out in your opinion request, Article X, Section 7 authorizes the legislature to provide for partial relief from taxation of forest lands as follows:

"For the purpose of encouraging forestry when lands are devoted exclusively to such purpose, and the reconstruction, redevelopment and rehabilitation of obsolete, decadent or blighted areas, the general assembly by general law, may provide for such partial relief from taxation of the lands devoted to any such purpose, and of the improvements thereon, by such method or methods, for such period or periods of time, not exceeding twenty-five years in any instance, and upon such terms, conditions, and restrictions as it may prescribe."

Section 254.080, RSMo 1969, implements the above-quoted constitutional provision and provides:

"Any lands approved and classified by the commission as forest croplands as defined in this chapter shall receive partial relief from taxation, as provided in said chapter, during a period or periods of time not to exceed twenty-five years in any instance."

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Your question, therefore, calls for a construction of the constitutional language upon the power of the general assembly by reason of the words "for such period or periods of time not exceeding twenty-five years in any instance."

"The general definition of the word "period", with reference to time, is to refer to a continuous period, * * *." Barrows v. Riss & Co., 179 S.W.2d 473, 475 (K.C.Ct.App. 1944). It was thus understood by the framers of the Constitution when Article X, Section 7 was discussed. On page 4721 of the Debates of the Constitutional Convention of 1943-1945, we find the following remarks by Mr. Kreamalmyer:

"... In the case of forestry, the Legislature may pass a total exemption or a partial exemption. I don't think there is very much of a line between Senator McReynolds amendment and Section 7, but the Legislature may pass a law relieving the owners of all of the tax for a certain period of time - it's twenty-five years as this Section 7 calls for. That's not a long enough time for a forest program, but I am not going to object to that because maybe in twenty-five years we would be passing on and somebody else can take that problem on, . . ."

Again with reference to Article X, Section 7, we find on page 4936:

"MR. COPE: I feel that I am in favor the the Committee's report on this proposition but I want to ask you something in regard to this proposed amendment. What is the limitation on the number of years that this relief can be given?

"MR. SHEPLEY: Twenty-five years."

In view of the foregoing, it is clear that the intent of the framers of the Constitution was to terminate the classification of land as forest crop land at the end of twenty-five years.

CONCLUSION

It is the opinion of this office that Article X, Section 7 of the Constitution of Missouri does not permit the Legislature to grant partial relief from taxation of forest crop land for a period longer than twenty-five years or to extend or renew such classification of forest crop land beyond a period of twenty-five years.

Honorable Earl L. Sponsler

The foregoing opinion, which I hereby approve, was prepared
by my Assistant, L. J. Gardner.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

JOHN C. DANFORTH
Attorney General

TAXATION (INTANGIBLE):
BLIND PERSONS:

The blind pension fund of the State of Missouri is not entitled to share in the intangible personal property tax collected by the state.

September 4, 1970

OPINION NO. 348

Honorable Robert A. Young
Senator, 24th District
3500 Adie Road
St. Ann, Missouri 63074



Dear Senator Young:

This official opinion is rendered pursuant to the request contained in your letter concerning the blind pension fund of the State of Missouri. More specifically, the following question is presented:

"Is the Blind Pension Fund entitled to a share of the intangible personal property tax collected?"

Article III, Section 38(b) of the Constitution of Missouri provides, in part, as follows:

"The general assembly shall provide an annual tax of not less than one-half of one cent nor more than three cents on the one hundred dollars valuation of all taxable property to be levied and collected as other taxes, for the purpose of providing a fund to be appropriated and used for the pensioning of the deserving blind as provided by law. * * * "

By authority of this constitutional provision, the legislature adopted Section 209.130, RSMo 1969, which, in pertinent part, reads as follows:

"There is hereby levied an annual tax of three cents on each one hundred dollars valuation of taxable property in the state of Missouri to provide a fund out of which shall be paid the

Honorable Robert A. Young

pensions for the deserving blind as herein provided. The tax shall be collected at the same time and in the same manner and by the same means as other state taxes are now collected. The tax, when so collected, shall be paid into the state treasury to the credit of the blind pension fund, out of which fund shall be paid the pension as provided by law.
* * *

Thus, it is provided in the constitution and the statutes that "taxable property" is to be taxed annually for the purpose of establishing and supporting a pension fund for the blind. "Taxable property" is classified by Article X, Section 4(a) of the Constitution of Missouri, which reads as follows:

" * * * class 1, real property; class 2, tangible personal property; class 3, intangible personal property. * * * "

Since intangible personal property is considered a form of "taxable property" by Article X, Section 4(a), supra, the question has been raised as to whether the blind pension fund is entitled to receive a portion of the tax on intangible personal property. At the present time no part of this tax is being paid into this fund.

Proper consideration of the question requires examination of certain other constitutional provisions and statutes relating specifically to intangible personal property taxation in Missouri.

Article X, Section 4(b), Constitution of Missouri, deals with the basis upon which property shall be taxed, stating:

"Property in classes 1 and 2 and subclasses of class 2, shall be assessed for tax purposes at its value or such percentage of its value as may be fixed by law for each class and for each subclass of class 2. Property in class 3 and its subclasses shall be taxed only to the extent authorized and at the rate fixed by law for each class and subclass, and the tax shall be based on the annual yield and shall not exceed eight per cent thereof."

It will be observed that real property and tangible personal property are taxed on the basis of value, while the tax on intangible personal property is based solely upon the "yield" derived from the property.

Article X, Section 4(c), Constitution of Missouri, deals with the distribution of the taxes collected on intangible personal property. That provision states:

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"All taxes on property in class 3 and its subclasses, and the tax under any other form of taxation substituted by the general assembly for the tax on bank shares, shall be assessed, levied and collected by the state and returned as provided by law, less two percent for collection, to the counties and other political subdivisions of their origin, in proportion to the respective local rates of levy."

Thus, all taxes on intangible personal property, less a small collection fee, are to be returned to the counties and other local political subdivisions.

In accordance with these constitutional provisions, the tax on intangible personal property has been implemented by statute. In Chapter 146, RSMo 1969, it is provided that the tax on intangible personal property shall be based upon the yield (which means the proceeds) of the property and that the rate of tax shall be four per cent of such yield. Every person, as therein defined, is required to file on or before April 15 a property tax return on intangibles, and the tax is payable at the time the return is made. Section 146.110, RSMo 1969, as amended, provides that the tax shall be distributed as follows:

"The director of revenue shall annually, on or before the fifteenth day of December, return the amount of intangible taxes collected, less two percent thereof, which shall be retained by the state for collection, to the county treasury of the county in which the particular taxpayers are domiciled or in which the intangible personal property which was the subject of the tax had its business situs. * * * "

Inasmuch as Article III, Section 38(b), Constitution of Missouri, and Section 209.130, RSMo 1969, provide for a tax based on the value of taxable property which is to be retained by the state for the benefit of the blind rather than returned to the counties and political subdivisions, it must be determined whether there is a conflict or whether the constitutional and statutory provisions can be reconciled.

It is the view of this office that the framers of the constitution did not intend to include intangible property within the scope of Article III, Section 38(b). The language of that provision is that the legislature shall provide a tax of not less than one-half of one cent nor more than three cents on the one hundred dollars valuation " * * * of all taxable property to be levied and collected as other taxes, * * * " (Emphasis added). The framers clearly intended for this property tax to be assessed, levied and collected in the same manner as were the general taxes on real estate and tangible personal property. Chapter 137, RSMo, which deals with the assessment and levy of property taxes, is concerned only with real property and tangible

Honorable Robert A. Young

personal property. Special provisions for the assessment and levy of intangible personal property taxes take this out of the general category. For example, Section 137.075 provides:

"Every person owing or holding real property or tangible personal property on the first day of January, including all such property purchased on that day, shall be liable for taxes thereon during the same calendar year."

The tax on intangible personal property is separately provided for by Chapter 146, RSMo, wherein the tax is based upon yield rather than valuation of the property. The apparent differences in the system of handling taxes on real and tangible personal property and intangible personal property indicate the framers of the constitution intended to limit the tax provided for in Article III, Section 38(b) to three cents on each one hundred dollars valuation of real and tangible personal property only.

It is well settled that if a literal interpretation of the language used in a constitutional provision would give it an effect in contravention of the real purpose and intent of the instrument as deduced from a consideration of all its parts, such intent must prevail over the literal meaning. *Moore v. Toberman*, 250 S.W.2d 701 (MO.1952). Furthermore, a constitutional provision should never be construed to work confusion and mischief unless no other reasonable construction is possible. *State ex rel. Jamison v. St. Louis-San Francisco Ry.Co.*, 300 S.W.274 (Mo.1927); *Moore v. Toberman*, (supra).

In the present situation a construction of Article III, Section 38(b), which would require intangibles to be taxed on the basis of valuation, would bring about a confusing result because other provisions of the constitution specifically state that all intangibles shall be taxed according to their yield. Furthermore, such a construction would require the state to retain taxes on intangible property which would conflict with the direction of Article X, Section 4(c) of the constitution requiring these to be returned to the counties and other political subdivisions.

In view of the foregoing, it is our opinion that the blind pension fund does not share in the taxes collected on intangible personal property.

In addition to the reasons set forth above, there are certain principles of construction which require us to reach the same conclusion. In 16 C.J.S., Constitutional Law, Section 25, the following rule is set forth:

"When general and special provisions of a constitution are in conflict, the special provisions should be given effect to the extent of their scope, leaving the general provisions

Honorable Robert A. Young

to control in instances where the special provisions do not apply."

The same construction must be applied to the statutory provisions. The special provisions relating to intangible personal property taxes are to be given effect over the provisions relating to taxation of property in general.

CONCLUSION

Therefore, it is the opinion of this office that the blind pension fund of the State of Missouri is not entitled to share in the intangible personal property tax collected by the state.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John E. Park.

Very truly yours,

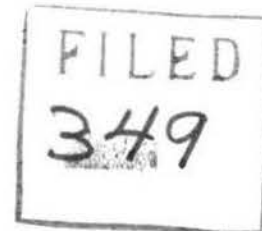
A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being more prominent.

JOHN C. DANFORTH
Attorney General

May 27, 1970

OPINION LETTER NO. 349

Honorable Richard Southern
State Senator
201 West Summer Avenue
Monroe City, Missouri 63456



Dear Senator Southern:

This is in response to your opinion request which is stated as follows:

"I am requesting an official opinion of your office as to the application of the 1970 census results to cities, counties, political subdivisions, and officials of these bodies, wherein there is a statutory population requirement or limitation defining what such body or official can or cannot do and setting amounts of public funds paid, made available or distributable to such bodies and officials

Since many persons in our state are concerned that the powers of some cities or political subdivisions will no longer be available to them if their population falls below a specified statutory figure, it is important to know: If a city which under 1960 census qualified because their population was over the minimum required to exercise certain powers, does such a political subdivision lose these presently held powers if it falls below that statutory figure under the 1970 census? If the body does lose these powers when is the effective date? When the figures are officially certified by some

Honorable Richard Southern

agency or some other date? What is the effective date? This is of extreme importance considering the possible action a body may need or want to take to attempt through their own citizens or some legislative body to change the specific statutory limits.

When would salaries to officials, gas tax distribution to cities and counties and any other payments be altered due to population changes under the 1970 census? Are there other matters beside salaries and gas tax payments which would be affected by changes in population from 1960 to 1970?

Could a political subdivision by special census or annexation at a date after 1970, and before the 1980 census certify a larger population than the 1970 figures, and if they did so, would these later figures be accepted to qualify these bodies or officials to increased salary, payments or powers?"

You have requested an early decision with respect to these questions; and for that reason, we will not attempt to analyze the myriad statutes involved.

First, we wish to call your attention to Section 1.100, RSMo 1959, which provides in full as follows:

"1. The population of any political subdivision of the state for the purpose of representation or other matters including the ascertainment of the salary of any county officer for any year or for the amount of fees he may retain or the amount he is allowed to pay for deputies and assistants is determined on the basis of the last previous decennial census of the United States. For the purposes of this section the effective date of the 1960 decennial census of the United States is July 1, 1961, and the effective date of each succeeding decennial census of the United States is July first of each tenth year after 1961; except that for the purposes of ascertaining the salary of any county officer for any year or for the

Honorable Richard Southern

amount of fees he may retain or the amount he is allowed to pay for deputies and assistants the effective date of the 1960 decennial census of the United States is January 1, 1961, and the effective date of each succeeding decennial census is January first of each tenth year after 1961.

"2. Any law which is limited in its operation to counties, cities or other political subdivisions, having a specified population or a specified assessed valuation, shall be deemed to include all counties, cities or political subdivisions which thereafter acquire such population or assessed valuation as well as those in that category at the time the law passed."

In our view, the above section fixes the effective date with respect to laws limited in operation to counties, cities, and other political subdivisions having a specified population. Therefore, the effective date for the purpose of representation or other matters as therein provided would be July 1, 1971, and the effective date for the purposes of ascertaining the salary of any county officer for any year or for the amount of fees he may retain or the amount he is allowed to pay for deputies and assistants is January 1, 1971.

It is, therefore, our view that where a city or political subdivision derives power solely by reason of the fact that it falls within the population range provided by the particular statute such city or political subdivision no longer retains the grant of power when its population falls outside the prescribed range. Where the population is determined solely by the 1970 census, the effective date in such a case would be July 1, 1971.

We have already stated that the effective date with respect to the population and the census figures as applied to the salaries of county officers is January 1, 1971.

With respect to gas tax distribution, we enclose Opinion No. 407, dated December 10, 1964, to Robert E. Yocom, in which it was held that gasoline tax distribution is based on the federal census figures.

With respect to your question of whether there are other matters besides salaries and gas tax payments, which would be affected by the changes in population, we cannot, as we stated, undertake a complete review of all such statutes.

Honorable Richard Southern

However, an example is the St. Louis City earnings tax, Sections 92.110, RSMo et seq., as amended, which authorizes the levy of an earnings tax by constitutional charter cities of over 700,000 population.

With respect to your last question concerning whether a political subdivision by special census or annexation after 1970 and before the 1980 census could attain a larger population as indicated by the 1970 figures, it is our view that such an increase could possibly be shown by annexation. That is, in our Opinion No. 407, 12-10-64, Yocom, copy enclosed, we noted that an area which incorporated after the federal census had been taken could possibly obtain a United States Bureau of Census certification with respect to population in its geographical area. On the basis of such a census determination, the population of the political subdivision would be increased in case of annexation. The increase in the population thus obtained would enable the political subdivision and its officials to, by reason of such increased census figures, take advantage of or come within certain statutes applicable to the population range reached by the annexation.

We are also enclosing Opinion 425, dated October 9, 1969, to McNary, which held that a special census conducted under provisions of Sections 71.160 through 71.180, RSMo 1969 is applicable in determining distribution of cigarette tax money in municipalities in a first class charter county.

We caution you, however, that this opinion was challenged in an action in the Circuit Court in Cole County, Cause No. 24,483, styled City of Bridgeton v. Gilstrap, and that said court on February 25, 1970, handed down a decision now being appealed to the Supreme Court of Missouri which held that such incorporated areas in St. Louis County could not use the special census, but must use the federal decennial census.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosures:

Op. No. 425,
10-9-69, McNary

Op. No. 407,
12-10-64, Yocom

LABOR:

PREVAILING WAGE:

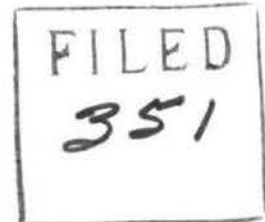
A public school district which constructs a school building under its own supervision and control without contracting

for construction of such building is not required to pay the "prevailing wage" rates determined by the Department of Labor and Industrial Relations.

OPINION NO. 351

August 3, 1970

Honorable Melvin R. Vogelsmeier
State Representative
One Hundred Nineth District
Concordia, Missouri 64020



Dear Representative Vogelsmeier:

This letter is in reply to your request for an official opinion from this office in which you ask the following questions:

"Is a Public School District who intends to build an addition to it's facilities by acting as it's own contractor in the purchase of materials, and, the hiring by the hour - labor to build said facility obligated under Section 290.210 through 290.340 as Amended RSMo 1969 & effective October 13, 1969, for the Prevailing Wage Law Scale as applicable to said job & specified in the general specifications of said project.

"Is Opinion No. 441-67 Dated 12/12/1967 still applicable as applies to a school district being able to proceed with construction under its own supervision and control without contracting?"

Any questions in the area of prevailing wages on public works, must include a discussion of the City of Joplin v. Industrial Commission of Missouri, 329 S.W.2d 687 (Mo. 1959), in which the court stated, in discussing the constitutionality of the Prevailing Wage Act:

". . . To construe the Act as applicable

Honorable Melvin R. Vogelsmeier

to direct employees of public bodies would make it unconstitutional as to all cities adopting their own charters under the provisions of Sec. 19, Art. VI, of the Constitution because Sec. 22 of Art. VI provides: 'No law shall be enacted creating or fixing . . . compensation of any municipal office or employment, for any city framing or adopting its own charter . . . Furthermore, the legislative history of the Act indicates an intent to limit its application to employees of contractors constructing public works on contracts with public bodies. . . We, therefore, hold the Act does not apply to employees of public bodies. . . ." Id. 692.

As is evident, the Court in the City of Joplin held that the legislative intention of the Prevailing Wage Act was to limit its application to employees of contractors constructing public works on contracts of public bodies. As such, it becomes relevant to investigate Section 290.250, RSMo 1969, which was enacted by Senate Bill No. 142 Seventy-fifth General Assembly in lieu of Section 290.250 RSMo Supp. 1967 which was repealed by such bill, to see if the legislature has expressed a contrary intent as to that which the court found in the City of Joplin case. The amendment to Section 290.250, RSMo 1969 provides as follows:

"Every public body authorized to contract for or construct public works, before advertising for bids or undertaking such construction shall request the department to determine the prevailing rates of wages for workmen for the class or type of work called for by the public works, in the locality where the work is to be performed. The department shall determine the prevailing hourly rate of wages in the locality in which the work is to be performed for each type of workman required to execute the contemplated contract and such determination or schedule of the prevailing hourly rate of wages shall be attached to and made a part of the specifications for the work. The public body shall then specify in the resolution or ordinance and in the call for bids for the contract, what is the prevailing hourly rate of wages

Honorable Melvin R. Vogelsmeier

in the locality for each type of workman needed to execute the contract and also the general prevailing rate for legal holiday and overtime work. It shall be mandatory upon the contractor to whom the contract is awarded and upon any subcontractor under him, to pay not less than the specified rates to all workmen employed by them in the execution of the contract. The public body awarding the contract shall cause to be inserted in the contract a stipulation to the effect that not less than the prevailing hourly rate of wages shall be paid to all workmen performing work under the contract. It shall also require in all contractor's bonds that the contractor include such provisions as will guarantee the faithful performance of the prevailing hourly wage clause as provided by contract. The contractor shall forfeit as a penalty to the state, county, city and county, city, town, district or other political subdivision on whose behalf the contract is made or awarded ten dollars for each workman employed, for each calendar day, or portion thereof, such workman is paid less than the said stipulated rates for any work done under said contract, by him or by any subcontractor under him, and the said public body awarding the contract shall cause to be inserted in the contract a stipulation to this effect. It shall be the duty of such public body awarding the contract, and its agents and officers, to take cognizance of all complaints of all violations of the provisions of sections 290.210 to 290.340 committed in the course of the execution of the contract, and, when making payments to the contractor becoming due under said contract, to withhold and retain therefrom all sums and amounts due and owing as a result of any violation of sections 290.210 to 290.340. It shall be lawful for any contractor to withhold from any subcontractor under him sufficient sums to cover any penalties withheld from him by the awarding body on account of said subcontractor's failure to comply with the terms of sections 290.210 to 290.340, and if payment has already been made to him, the contractor

Honorable Melvin R. Vogelsmeier

may recover from him the amount of the penalty in a suit at law." (Emphasis supplied.)

As can be seen from the amended portion of Section 290.250, those public bodies authorized to contract for or to construct public works must make a request of the Department of Labor and Industrial Relations, previous to advertising for bids or undertaking construction, to determine the prevailing rates of wages for workmen. A full reading of the recently amended Section 290.250, RSMo 1969, however, indicates that the legislative intent is still to limit the application of the Prevailing Wage Act to employees of contractors constructing public works on contracts with public bodies. This intent can be seen from the fact that the entire legislative scheme for the amended portions of the prevailing wage on Public Works Act, would seem to indicate that the legislative intent was to limit its application to employees of contractors, to wit: Section 290.250, RSMo 1969, refers to the awarding of a contract to a contractor, the requirement of a contractor's bond, and the penalty provisions are phrased such as to be applicable to contractors and subcontractors only; Section 290.290, RSMo 1969, requires that contractors and subcontractors engaged in construction on public works must keep full and accurate records indicating the occupations and crafts of every workman and the actual wages paid, with the additional requirement that an affidavit stating the contractor or subcontractor has complied with the provisions and requirement of the Prevailing Wage Act is to be filed with the public body; Section 290.300, RSMo 1969, gives a cause of action to any workman employed by a contractor or subcontractor under a contract to a public body who shall be paid for his services in a sum less than the stipulated rates for work done under the contract; Section 290.315, RSMo 1969, requires the payment by all contractors and subcontractors of wages and legal tender, without deductions for food, sleeping accommodations or transportation. Section 290.230, RSMo 1969, provides in part as follows:

" . . . Only such workmen as are directly employed by contractors or subcontractors in actual construction work on the site of the building or construction job shall be deemed to be employed upon public works."

Thus, it is the conclusion of this office, that the legislative intent is to limit the application of the Prevailing Wage Act to employees of contractors constructing public works under contracts let by public bodies.

Your second question involves a former Opinion of this office, Opinion No. 441, 12-12-67, Curtis, which held that a school district

Honorable Melvin R. Vogelsmeier

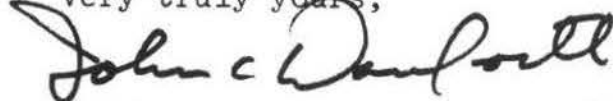
which is authorized to construct facilities could, after advertising for bids, exercise its sound discretion and reject any and all bids and proceed with construction of facilities under its own supervision and control without contracting. After a reconsideration of this Opinion in light of the recent amendments to the Prevailing Wage Act, it is the conclusion of this office that Opinion No. 441, 12-12-67, Curtis, retains its applicability, and that after a school district has requested the Department of Labor and Industrial Relations to determine the prevailing rates of wages for the workmen of the class called for by the work contemplated, the bids have been advertised, may in the exercise of its sound discretion reject any and all bids and may proceed with the construction of facilities under its own supervision and control without letting a contract.

CONCLUSION

It is, therefore, the opinion of this office that a public school district which constructs a school building under its own supervision and control without contracting for construction of such building is not required to pay the "prevailing wage" rates determined by the Department of Labor and Industrial Relations.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Kenneth L. Romines.

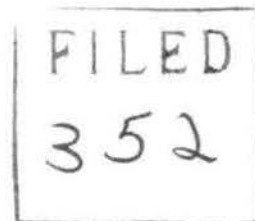
Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being the most prominent.

JOHN C. DANFORTH
Attorney General

June 2, 1970

OPINION LETTER NO. 352
(Answered by letter-Park)



Honorable Allen S. Parish
Prosecuting Attorney
Saline County Court House
Marshall, Missouri 65340

Dear Mr. Parish:

This letter is in response to your request for clarification of Attorney General Opinion No. 288, issued April 29, 1970.

The second conclusion contained in the opinion is that:

"The county is liable for payment of tax on wages paid by the county to clerical and stenographic assistants of a third class county assessor."

This is not meant to include any part of wages paid to clerical and stenographic assistants by a county assessor from personal funds. The liability of the county for payment of social security taxes on wages of its employees is limited to wages paid from county funds.

Yours very truly,

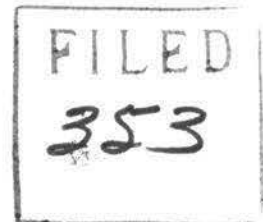
JOHN C. DANFORTH
Attorney General

(Answer by Letter) Wood

OPINION LETTER NO. 353

June 26, 1970

Mr. Robert L. Dunkeson
Executive Secretary
State Inter-Agency Council
For Outdoor Recreation
1203 Jefferson Building
P. O. Box 564
Jefferson City, Missouri 65101



Dear Mr. Dunkeson:

You have requested our opinion as to the statutory authority for the City of Memphis, Missouri to build a recreation lake with emergency water supply more than one mile from the corporate limits of the city.

Memphis is a city of the fourth class. Section 88.773, RSMo authorizes a city of this class:

" . . . to erect, maintain and operate waterworks for the city, . . . and to acquire by purchase, donation or condemnation, suitable grounds within or without the city, upon which to erect said works,"

Section 79.380, House Bill No. 45, Seventy-fifth General Assembly authorizes the board of aldermen of a fourth class city to:

" . . . purchase or condemn and hold for the city, within or without the city limits, or within ten miles therefrom, all necessary lands for . . . waterworks,"

We believe that a "waterworks" might properly include an artificial

Mr. Robert L. Dunkeson

lake designed for emergency water supply, and that if the City of Memphis acts pursuant to Section 88.773, RSMo in erecting, maintaining and operating a municipal waterworks, it may acquire and include as a part thereof, a reservoir which is not more than ten miles outside of the city limits.

If the lake is not a component of a municipal waterworks, but is solely recreational in nature, Section 64.755, RSMo, Section 79.390 RSMo and Section 90.010 RSMo would apply. Section 64.755 RSMo authorizes any city to establish recreational areas, Section 79.390 authorizes a fourth class city to purchase and hold public park grounds within the city, or within three miles of the city, and Section 90.010 RSMo authorizes a city to establish parks or pleasure grounds, within the city, or within one mile therefrom. This office has previously ruled that Section 64.755 RSMo does not authorize a city by itself to establish recreational areas outside its corporate limits. (See enclosed Opinion No. 43, January 17, 1967). However, both Sections 79.390 and 90.010, RSMo authorize fourth class cities to establish park grounds outside their city limits. The territorial limitations expressed in these statutes obviously conflict and we are of the opinion that that of the statute specially applicable to fourth class cities must prevail. Accordingly, it is our opinion that the City of Memphis may purchase and hold a solely recreational lake not more than three miles from the city's limits.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure:

Op. No. 43
1-17-67, Rains

MOTOR VEHICLES: A member of an automobile dealer's family
LICENSES: may legally operate a vehicle with a
MOTOR VEHICLE LICENSES: dealer's license plate only if the vehicle
is held for sale by the dealer and the
family member is an officer or employee of the dealership. If the
family member is an officer or employee of the dealership, such
vehicle may be used not only for business purposes but also for pri-
vate reasons.

August 18, 1970

OPINION NO. 355

Honorable James L. Paul
Prosecuting Attorney
McDonald County Courthouse
Pineville, Missouri 64856



Dear Mr. Paul:

This is in response to your request for an official opinion from this office on the question of whether a motor vehicle dealer is making illegal use of his dealer's license plates by allowing members of his family to operate, for their own personal use and enjoyment, vehicles which are owned by the dealership and which display dealer's license plates.

Section 301.250, RSMo 1969, provides:

"1. All manufacturers and dealers shall, instead of registering each motor vehicle manufactured or dealt in, make a verified application upon a blank to be furnished by the director of revenue, for a distinctive number for all the motor vehicles owned or controlled by such manufacturer or dealer, said application to contain:

*

*

*

"3. The dealer plates may be displayed on any motor vehicle used by an employee or officer and owned by the manufacturer or dealer, but shall not be displayed on any motor vehicle or trailer hired or loaned to others or upon any regularly used service or wrecker vehicle.

Honorable James L. Paul

"4. . . . For the purposes of this section a dealer is any person, firm, corporation, association, agent or subagent, engaged in the business of selling or exchanging new, used, or reconstructed motor vehicles or trailers and who buys and sells, or exchanges four or more new, used or reconstructed motor vehicles or trailers in any one calendar year."

Section 301.250 makes it clear that a dealer's license plate is not a general and unlimited license. Rather, it is a license which legally may be displayed only upon a certain restrictive class of vehicles which are used by a certain class of people.

The first limitation is that a dealer's license may be displayed only upon a vehicle which is being held for sale by a dealer. This fact is shown by an examination of Section 301.250, supra, which states that a dealer's plate may be validly displayed upon a vehicle only if the vehicle is "owned by the . . . dealer" (subsection 3) and "dealt in" by the dealer (subsection 1). Furthermore, a dealer's plate may not be displayed "upon any regularly used service or wrecker vehicle" (subsection 3). This wording which limits the use of a dealer's plate to a motor vehicle "dealt in" clearly indicates that the intent of the legislature was to include only vehicles held for sale by a dealer.

Secondly, the unambiguous wording of Section 301.250.3, RSMo 1969, permits the display of a dealer's license upon a vehicle only if the vehicle is being "used by an employee or officer" of the dealership. In addition, this subsection prohibits the display of a dealer's license on a vehicle which is "hired or loaned to others." As a result, whether or not a person may validly operate a dealer owned vehicle, which displays a dealer's license plate, depends upon whether that person is an employee or officer of the dealership. This applies with equal force to a member of a dealer's family as it does to anyone else. Thus, a member of the family referred to in your request may legally operate the vehicles displaying dealer's license plates if, and only if, he is an officer or employee of the dealership. If he is not an officer or employee of the business, then his operation of a vehicle with a dealer's plate is illegal in that he is operating, in effect, an unlicensed vehicle.

If the family member is an officer or employee of the business, the question arises as to whether he may use the vehicle for his own personal purposes. Since Section 301.250, supra, is silent on this point, it is necessary to consider the intent of the legislature. *St. Louis County v. State Highway Commission*, 409 S.W.2d 149 (Mo.1966). In construing a statute or ordinance, an examination of the historical development of the legislation, including changes therein and related statutes or ordinances, is permitted. *Murrell v. Wolff*, 408 S.W.2d 842 (Mo.1966).

Honorable James L. Paul

It is important to note that Section 301.250, supra, is derived from Section 301.250, RSMo 1949, which limited the use of dealer's license plates as follows:

"3. Display of duplicate number plates: Such duplicate number plates may be displayed on any motor vehicle used in the business of the manufacturer or dealer, but shall not be displayed on any motor vehicle or trailer used for the private purposes of any such manufacturer, dealer or their employees, or on any motor vehicle or trailer hired or loaned to others." (Emphasis added)

This wording clearly limited the use of a dealer owned vehicle, displaying a dealer's license plate, to business only.

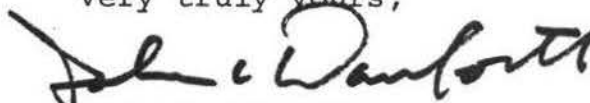
However, in 1957, the subsection was changed by an amendment which substituted the words "by an employee or officer and owned by" for the words "in the business of," and further substituted the last provision of the subsection beginning with the words "but shall not be displayed" for the provision "but shall not be displayed on any motor vehicle . . . used for the private purposes of any such . . . dealer or their employees . . . " A.L.1957, page 635. The most reasonable explanation for this amendment is that the legislature intended to broaden the permissible use of dealer owned vehicles. The purpose of the amendment appears to be to remove the limitations with respect to business use only, and to allow a dealer owned vehicle to be used by employees and officers for their own private purposes. Accordingly, it is the view of this office that a person who is an officer or employee of a dealership may legally operate, for purely private purposes, a vehicle owned by the dealership which displays a dealer's license plate.

CONCLUSION

Therefore, it is the opinion of this office that a member of an automobile dealer's family may legally operate a vehicle with a dealer's license plate only if the vehicle is held for sale by the dealer and the family member is an officer or employee of the dealership. If the family member is an officer or employee of the dealership, such vehicle may be used not only for business purposes but also for private reasons.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John E. Park.

Very truly yours,



JOHN C. DANFORTH
Attorney General

September 4, 1970

OPINION LETTER NO. 358

(Answered by letter-Park)

Honorable George W. Parker
State Representative
District No. 120
819 Crestland
Columbia, Missouri 65201



Dear Representative Parker:

This letter is in response to your request for an opinion concerning the imposition of Missouri sales tax in the situation where a manufacturing firm sells bottled soft drinks to a purchaser for resale.

More specifically, you raised the following questions:

"1. Is it correct to assume that a soft drink manufacturing firm that sells their product for re-sale by others is a wholesaler? And, when and if this same firm sells its product to others who are not going to re-sell then the firm is functioning as a retailer?

"2. Does a firm selling soft drinks, when selling their product to a purchaser who will re-sell said product, have any liability or responsibility under law to collect the sales tax for the State?"

Sections 144.010 and 114.510, RSMo 1969, impose a 3 per cent tax upon every retail sale of tangible personal property in the State of Missouri.

Honorable George W. Parker

Section 144.270, RSMo 1969, empowers the Director of Revenue to promulgate rules and regulations for the the administration and enforcement of the sales tax law. Pursuant to that section, the Director of Revenue has issued Rule 67, stating:

"Vending machines and other automatic sales devices.--Sales of all merchandise such as candies, drinks, tobaccos, cigarettes, etc., made by means of vending machines and other automatic sales devices through which sales of tangible personal property are made for money, coins, tokens or coupons redeemable in money's worth are taxable sales of tangible personal property regardless of the fact that on some types of machines it is impossible to collect in addition to the sales price, the tax thereon.

"When vending machines are placed in a coded establishment, and the person operating such establishment owns the articles sold through the vending machines and makes collections of the coins deposited in the machines in the payment for articles so sold, such person must report and pay the tax measured by his gross receipts from sales made through such vending machines. * * * "

"However, if the person operating such establishment has no control over or right of access to the articles in vending machines located on his premises, and if he has no access to the gross receipts in such machines and no right to remove such receipts, without the consent of the owner of such machines, he will not be considered to be the owner of the articles sold through such vending machines, but the owner of such articles will be held liable for the sales tax."

Rule 67 provides that sales of bottled soft drinks to individual consumers through vending machines are presumed to be retail sales by the manufacturing firm, not the business concern upon whose premises the vending machines are located, unless said business concern is coded by the Department of Revenue as a retailer and has control over or access to the articles in the vending machines and makes collection of the gross receipts produced by such machines.

Honorable George W. Parker

Section 144.210, RSMo 1969, creates a presumption that sales to individual consumers through vending machines are retail sales and the manufacturer is liable for the collection of sales tax upon such sales unless he proves that he is not making sales at retail. Likewise, in Attorney General Opinion No. 13, dated January 13, 1950, issued to Mr. W. H. Burke, a copy of which is enclosed, this office expressed the view that the Department of Revenue may consider sales by a wholesaler to a purchaser who is not coded and paying sales tax, as retail sales, and the burden is on the wholesaler to show otherwise. We believe the principle expressed in this opinion would be applicable to a manufacturer under the circumstances outlined in your letter.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosure:
Op.No.13-50-Burke

LIQUOR:
INTOXICATING LIQUOR:

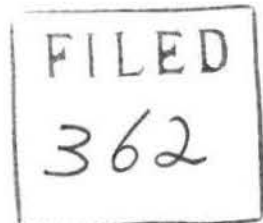
The 1970 census population figures
become effective on July 1, 1971,
for the purpose of determining whet-

her or not a license to sell liquor by the drink at retail, other than malt liquor containing alcohol not in excess of five percent, for consumption on the premises can be issued in any city having a population of under twenty thousand after the 1970 census. Any license authorizing the sale of intoxicating liquor by the drink at retail for consumption on the premises, other than malt liquor containing alcohol not in excess of five percent, expiring on June 30, 1971, in such a city cannot be renewed unless a majority of the qualified voters of that city have previously authorized such licenses through the provisions of the local option laws of the Liquor Control Act, or until they subsequently do so.

OPINION NO. 362

June 29, 1970

Honorable Harold L. Volkmer
State Representative
District No. 100
120 North Third Street
Hannibal, Missouri 63401



Dear Representative Volkmer:

This is in response to your request for an opinion from this office concerning the effect of the local option provisions of the Liquor Control Act on any cities in the State of Missouri which showed a population in excess of twenty thousand after the 1960 census but which will show a population of less than twenty thousand after the 1970 census. Specifically, you ask the following questions:

"1. When does the 1970 census population figures become effective within the meaning of Section 311.090?

"2. Whether or not a business licensed properly under Chapter 311 prior to the effective date of the census is entitled to continue in business until the expiration of his license under said Chapter, or must the licensee discontinue business upon the effective date of the population census?

"3. When may the Petition provided for in Section 311.110 be circulated and signed and filed with the city officials? Section 311.090 provides that the election cannot be held until the census has been completed."

Honorable Harold L. Volkmer

Section 311.090, RSMo 1959, provides:

" . . . no license shall be issued for the sale of intoxicating liquor, other than malt liquor containing alcohol not in excess of five per cent by weight, by the drink at retail for consumption on the premises where sold, in any incorporated city having a population of less than twenty thousand inhabitants, until the sale of such intoxicating liquor, by the drink at retail for consumption on the premises where sold, shall have been authorized by a vote of the majority of the qualified voters of said city. Such authority to be determined by an election to be held in said cities having a population of less than twenty thousand inhabitants, under the provisions and methods set out in this chapter. The population of said cities to be determined by the last census of the United States completed before the holding of said election; . . ."

In Opinion No. 13, issued March 16, 1949, to Mr. Edmund Burke (copy enclosed), we determined that the words "last census of the United States" meant the last Federal decennial census. Section 1.100, RSMo 1959, provides that the population of any political subdivision shall be determined on the basis of the last previous decennial census of the United States. It also provides that the effective date of the 1960 decennial census is July 1, 1961, and the effective date of each succeeding decennial census is July 1 of each tenth year after 1961. Therefore, it is our opinion that the 1960 census figures are controlling in determining whether or not a license for the retail sale of liquor by the drink for consumption on the premises can be issued without compliance with the local option provisions of the Liquor Control Act until July 1, 1971, at which time the 1970 census figures become effective. As of July 1, 1971, no license can be issued for the retail sale of liquor by the drink for consumption on the premises, other than malt liquor containing alcohol not in excess of five percent by weight, in any city showing a population of less than twenty thousand according to the 1970 census unless or until such licensing shall have been authorized by a vote of the majority of the qualified voters of said city pursuant to the local option provisions of the Liquor Control Act.

Section 311.240, Sub. 1, RSMo 1959, provides that all liquor licenses shall expire on June 30 of each year. Therefore, those licenses authorizing the sale of intoxicating liquor by the drink

Honorable Harold L. Volkmer

for consumption on the premises, other than malt liquor with an alcoholic content not exceeding five percent, issued in any city showing a population loss from over twenty thousand to under twenty thousand inhabitants according to the 1970 census cannot be renewed following their expiration on June 30, 1971, unless or until a majority of the qualified voters of such city have approved said sales by the drink at retail for consumption on the premises.

With respect to your third question, it is our opinion that a special election to determine whether or not intoxicating liquor may be sold by the drink at retail for consumption on the premises can be held at any time, provided that such an election has not been held within four years previously. Section 311.110, RSMo 1959, provides that an election shall be held within forty days after receipt of a petition signed by one-fifth of the qualified voters of any incorporated city to determine whether or not intoxicating liquor, other than malt liquor containing not to exceed five percent of alcohol by weight, shall be sold, furnished or given away within the corporate limits of such incorporated city. Section 311.160, RSMo 1959, provides that once an election has been held and decided either for or against the sale of intoxicating liquor by the drink at retail for consumption on the premises, the question shall not again be submitted to a vote for at least four years in the same incorporated city, and then only on a petition conforming to the provisions of the local option law. Obviously, it was not the intention of the legislature in Section 311.090 to limit local option elections only to those cities having a population of less than twenty thousand, but rather simply to insure that sales of liquor by the drink at retail for consumption on the premises in cities with a population of less than twenty thousand shall have been authorized, at some point, by a vote of the majority of the qualified voters of said city. Since the statutes provide that an election can be held in a city of any size for the purpose of approving or disapproving liquor by the drink, and, further, since the statutes provide that the results of this election are binding for at least four years in that city and can then be changed only by further action under the local option provisions, it is our view that the decision of the majority of the qualified voters in any city remains in effect until changed by a subsequent election, regardless of population changes.

Having reached this conclusion, we are obliged to withdraw Opinion No. 78, issued on October 4, 1950, to the Honorable Carl F. Sapp. That opinion held that a vote of disapproval of liquor by the drink by a majority of the residents of a city of under twenty thousand inhabitants would not apply as a matter of law when the city attained a population of over twenty thousand.

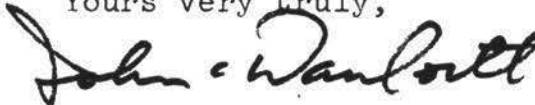
CONCLUSION

Honorable Harold L. Volkmer

Therefore, in answer to your request, it is our opinion that the 1970 census population figures become effective on July 1, 1971 for the purpose of determining whether or not a license to sell liquor by the drink at retail, other than malt liquor containing alcohol not in excess of five percent, for consumption on the premises can be issued in any city having a population of under twenty thousand after the 1970 census. Any license authorizing the sale of intoxicating liquor by the drink at retail for consumption on the premises, other than malt liquor containing alcohol not in excess of five percent, expiring on June 30, 1971 in such a city cannot be renewed unless a majority of the qualified voters of that city have previously authorized such licenses through the provisions of the local option laws of the Liquor Control Act, or until they subsequently do so.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Richard L. Wieler.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being the most prominent.

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 13
3-16-49, Burke

Answered by letter-Bartlett

May 28, 1970

OPINION LETTER NO. 363

Mr. Hubert Wheeler
Commissioner of Education
State Department of Education
Jefferson State Office Building
Jefferson City, Missouri 65101



Dear Mr. Wheeler:

This letter is in response to your request for our review and certification of the Proposal for a Grant under Section 402, Elementary and Secondary Education Amendments of 1967 (Public Law 90-247).

It is the opinion of this office that the Missouri State Board of Education is the agency in the state primarily responsible for state supervision of public elementary and secondary schools and is the "state educational agency" as defined in Section 801(k) of Title VIII, Public Law 89-10, as amended; and that the Missouri State Board of Education has the authority under state law to submit a proposal for a grant pursuant to Section 402 of Title IV, Public Law 90-247.

In conjunction with this opinion letter which constitutes our official certification of this proposal, we have completed the required certification form.

Very truly yours,

JOHN C. DANFORTH
Attorney General

SCHOOLS:
TAXATION (SCHOOLS):
CONSTITUTIONAL LAW:

Pursuant to the terms of Article X, Section 11(c) of the Missouri Constitution and Section 164.021, RSMo 1967 Supp., a tax rate approved by two-thirds of the qualified electors voting thereon pur-

suant to the first clause of Section 11(c) is a valid increase of the maximum rate of taxation permitted by Section 11(b) of Article X of the Missouri Constitution for the period authorized by the voters (not to exceed four years) and, at the end of the authorized period (not to exceed four years), the increased tax rate expires. The rate for the next succeeding year will be the rate imposed by the school board of the district which cannot exceed the limitations contained in Section 11(b), Article X, Missouri Constitution unless the qualified voters of the district have authorized an increase pursuant to the provisions of Section 11(c) Article X, Missouri Constitution and Section 164.021, RSMo 1967 Supp. With reference to the Kirkwood School District R-7, the tax rate of \$4.47 approved by the voters in 1969, is effective for only one year. The tax rate for subsequent years will be limited by provisions of Section 11(b), Article X, Missouri Constitution, to a maximum of \$1.25 on hundred dollars assessed valuation unless the voters of the district authorize an increase in this basic rate pursuant to the provisions of Section 11(c) of Article X, Missouri Constitution and Section 164.021, RSMo 1967 Supp.

OPINION NO. 365

June 5, 1970

Honorable Harlan A. Gould
State Representative
Forty-fifth District
10 Adams Lane
Kirkwood, Missouri 63122



Dear Representative Gould:

This official opinion is issued in response to your request for a ruling on the following question:

"Does a school district which has been operating its schools on a tax rate, for a period of one year, obtained by two-thirds voter approval, revert to such rate if its proposal for an increased rate for a subse-

Honorable Harlan A. Gould

quent year fails to get the necessary majority for approval, or does such district's operating levy revert to the \$1.25 which the Board can levy without voter approval?"

As background for this inquiry you provided the following information:

"The Kirkwood School District R-7 is a six-director district which has submitted a proposal to increase the annual rate of taxation beyond the rate authorized by the Constitution for District purposes without voter approval at three elections and the fourth such election is scheduled on June 16. The levy under which said District is operating its schools during the current year was a one-year levy approved by a two-thirds majority of the voters of the School District last year. Information has been given to the residents of the District to the effect that the continued defeat of the proposed school levy would not cause the District's operating levy to revert to the \$1.25, which it can levy without voter authorization, but rather that the levy would revert to that which had been voted for the previous year. That contention is said to be based upon Opinion No. 249 issued by your office on September 4, 1969, to Honorable Stephen Burns, the State Representative of the 42nd District. Counsel for the District do not believe that your opinion so held, but the confusion caused by that interpretation of your Opinion can only be corrected, it is believed, by an official Opinion from your office relative to the exact factual situation in which the Kirkwood District and other St. Louis County Districts find themselves. This matter is of utmost urgency in that the tax rate proposal will be again submitted to the voters of this District on June 16, 1970, and it is imperative that the confusion which has resulted from what is believed to be a misinterpretation of your September 4, 1969 Opinion be settled promptly."

We have been advised by the attorneys for the Kirkwood School District R-7 that on April 29, 1969, the voters of the district authorized for one year a tax rate of \$3.22 in excess of the annual

Honorable Harlan A. Gould

rate of \$1.25 permitted by the Missouri Constitution without voter approval. When added to a levy of \$.52 for debt service, the total tax rate for the district for the 1969-70 school year was \$4.99. It should be emphasized that the proposal to increase the tax rate approved by the voters of the district in 1969 expressly provided that the \$4.47 operating levy was for only one year. Therefore, we understand your inquiry to be whether the \$4.47 tax rate authorized in 1969 for the 1969-70 school year will remain in effect for the 1970-71 school year if the voters fail to approve any increase over the maximum \$1.25 rate which the school board of the district can levy without voter approval.

Article X, Section 11(b) of the Missouri Constitution limits local tax rates including rates assessed by school districts. The provisions pertaining to school districts are as follows:

"Any tax imposed upon such property by municipalities, counties or school districts, for their respective purposes, shall not exceed the following annual rates:

* * *

"For school districts formed of cities and towns, including the school district of the city of St. Louis--one dollar and twenty-five cents on the hundred dollars assessed valuation;

"For all other school districts--sixty-five cents on the hundred dollars assessed valuation. . . ."

Assuming that the Kirkwood School District R-7 is a school district formed of a city or town, a maximum tax rate of \$1.25 on the hundred dollars assessed valuation could be levied without voter approval. However, if the Kirkwood School District desires to assess a higher tax, reference must be had to Article X, Section 11(c), Missouri Constitution, which provides as follows:

"§11(c). INCREASE OF TAX RATE BY POPULAR VOTE

"In all municipalities, counties and school districts the rates of taxation as herein limited may be increased for their respective purposes for not to exceed four years, when the rate and purpose of the

Honorable Harlan A. Gould

increase are submitted to a vote and two-thirds of the qualified electors voting thereon shall vote therefor; provided in school districts the rate of taxation as herein limited may be increased for school purposes so that the total levy shall not exceed three times the limit herein specified and not to exceed one year, when the rate period of levy and the purpose of the increase are submitted to a vote and a majority of the qualified electors voting thereon shall vote therefor; provided in school districts in cities of 75,000 inhabitants or over the rate of taxation as herein limited may be increased for school purposes so that the total levy shall not exceed three times the limit herein specified and not to exceed two years, when the rate period of levy and the purpose of the increase are submitted to a vote and a majority of the qualified electors voting thereon shall vote therefor: Provided, that the rates herein fixed, and the amounts by which they may be increased, may be further limited by law; and provided further, that any county or other political subdivision, when authorized by law and within the limits fixed by law, may levy a rate of taxation on all property subject to its taxing powers in excess of the rates herein limited, for library, hospital, public health, recreation grounds and museum purposes."

The \$4.47 tax rate authorized by the voters of the Kirkwood R-7 School District in 1969, is more than three times the limit of \$1.25 specified in Article X, Section 11(b). Therefore, the provisions of Section 11(c) providing for a majority vote on a levy not exceeding three times the limit specified in Section 11(b) were not applicable. The \$4.47 tax rate had to receive and did receive the approval of two-thirds of the qualified electors voting on the proposition as required in the first clause of Article X, Section 11(c).

Section 164.021, RSMo 1967 Supp., implements the provisions of Section 11(c) and provides in part as follows:

"1. Whenever it becomes necessary, in the judgment of the school board of any

Honorable Harlan A. Gould

school district in the state, to increase the annual rate of taxation beyond the rate authorized by the constitution for district purposes without voter approval, or when voters of the district equal in number to ten per cent or more of the number of votes cast for the member of the school board receiving the greater number of votes cast at the last school election in the district petition the board, in writing, for such an increase of the rate, the board shall determine the rate of taxation necessary to be levied in excess of the authorized rate, and the purpose or purposes for which the increase is required specifying separately the rate of increase required for each purpose, and the number of years, not in excess of four, for which each proposed excess rate is to be effective. The proposal may provide for a greater rate of increase in one or more years than in others and acceptance of a proposal to increase the tax levy for any year or years shall not prevent the board from subsequently proposing a further increase in the tax levy for the same year or years.

* * *

"4. If the necessary majority of the voters voting thereon, as required by article X, section 11, of the constitution, favor the proposed increase, the result of the vote, including the rate of taxation so voted in the district for each purpose, and the number of years the rate is to be effective shall be certified by the clerk of the district to the clerk of the court of the proper county, who, on receipt thereof, shall assess the amount so certified against all taxable property of the school district as provided by law. In metropolitan districts the certification shall be made by the secretary of the board as required by law."

Where the language of a statute or constitutional provision is plain and admits of but one meaning, there is no room for construction.

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Rathjen v. Reorganized School District R-2, 365 Mo. 518, 284 S.W.2d 516, 523 (Banc, 1955). It is our belief that the provisions of Section 11(c), Article X, Missouri Constitution, and Section 164.021, RSMo 1967 Supp., plainly provide that a tax rate over and above the basic rates set forth in Section 11(b), Article X, Missouri Constitution, is a valid tax rate only for the period authorized by the voters of the district. In Section 11(c), the basic rates of taxation may be increased for a period "not to exceed four years". In paragraph 1 of Section 164.021, RSMo 1967 Supp., the proposal to increase the tax rate must state "the number of years, not in excess of four, for which each proposed excess rate is to be effective". Paragraph 4 of Section 164.021 provides that if the necessary majority of the voters approve the proposed increase, "the result of the vote including . . . the number of years the rate is to be effective . . ." shall be certified to the clerk of the proper county. Furthermore, in the suggested form of proposal and ballot for a tax rate increase found in Section 164.031, RSMo 1967 Supp., a blank is provided for insertion of the number of years the proposed rate will be levied. The language of these constitutional and statutory provisions admit of but one meaning -- a tax rate increase is effective only for the period of time (four years or less) that the voters authorize.

However, if we assume that there is some ambiguity or conflict in Section 11(c) which would require the courts to construe it, the fundamental purpose in construing a constitutional provision is to ascertain and give effect to the intent of the framers and to the people who adopted it. Rathjen v. Reorganized School District R-2, supra, at 524. In this instance, the framers were the members of the Sixty-fifth General Assembly of Missouri since Section 11(c) in its entirety was repealed and a new section adopted in lieu thereof. The amendment was submitted by Senate Joint Resolution No. 3, Sixty-fifth General Assembly. Laws of Missouri, 1949, p. 642. Such constitutional amendment was adopted by the voters of Missouri at the general election November 7, 1950. However, the first clause of Section 11(c) was included in the original Section 11(c) as adopted by the Constitutional Convention of 1943-44 and approved by the people of the State of Missouri in 1945. Therefore, it is relevant to an inquiry into the meaning of the first clause of Section 11(c), to inquire into the intent of the members of the Constitutional Convention in approving that clause. See Rathjen v. Reorganized School District R-2, supra, at 525.

The report of the Committee on Taxation-Levy, Assessment and Collection No. 10, File 19, proposed a Section 11 which contained the following proviso:

"Provided, that in all municipalities, counties and school districts, the rate

Honorable Harlan A. Gould

of taxation as herein limited, or as further limited by the General Assembly, may be increased for their respective purposes when the rate of such increase and the purpose for which it is intended shall have been submitted to a vote and two-thirds of the qualified voters voting on such proposition shall vote therefor; and, provided further, that any municipality, county, or other political subdivision, when authorized by law and within the limits fixed by law, may levy a rate of taxation on all property subject to its taxing powers in excess of the rates herein limited, for library, hospital, public health, and other public purposes." Verbatim Stenotype Transcription of the Debates of the 1943-44 Constitutional Convention of Missouri, Part 10, page 4735.

During the debates on Section 11, the following exchange took place between Mr. Shepley, Chairman of the Committee on Taxation, and Mr. Righter:

"MR. SHEPLEY: Mr. President, there is just one - I don't intend to debate this at all. I know that the Convention will be glad to have had the reaction of the delegates from the community that is to be affected. My own purpose, and my only purpose in rising is this. Mr. Righter, in his remarks referred to my understanding of it. I have assumed that in the section, the proviso giving the two-thirds of those voting at the election, a right to exceed the rates, become a permanent thing and there is no provision by which they could ever reduce them. Now, that is not at all our intention and it is not our understanding of the words as we have used them. I call your attention to the fact that they are virtually identical with the words used in the present Constitution in which the voters of the school districts are permitted within limits, to vote an increased rate and as we all know, there is nothing permanent about those increased rates so authorized that complaint has been due to the fact that they have to vote and vote and vote and keep on voting year after year because they are not permanent, so if there is any question about that, I would certainly want

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to have it cleared up, but I am confident that the authorization contained in the Committee Report does not and would not result in a permanent increase that would be there forever and never be capable of being reduced. As a matter of fact, according to our understanding, it is only good for the period for which it is authorized, which is ordinarily the fiscal period as to which they are then voting the rate.

MR. RIGHTER: Mr. President, may I inquire of Mr. Shepley?

MR. SHEPLEY: I yield.

MR. RIGHTER: Mr. Shepley, suppose that under this section, the people of a certain county vote that the rate instead of thirty-five cents, shall be a dollar? Well now, does that rate so voted only, is it your impression that that vote so voted only continues until the following year?

MR. SHEPLEY: During the fiscal period for which the appropriation or rates are about to be established. Yes, that would be my construction.

MR. RIGHTER: Is there some language in the section which is expressly to that effect?

MR. SHEPLEY: No, but I think it has been, the general construction. You don't think there has ever been an exemption to it, Mr. Righter, that what they are voting on at the time is what will the school rates become for this coming fiscal period. In other words, you are about to have the rates established for the ensuing period and the voters are asked to authorize an increased rate for the schools and they vote on that and I am satisfied by the fact that they have regular annual elections in some cases where they only vote every two years, they vote every two years on it, but we were advised in the Committee that it only stands between elections and if they want to enjoy that increase again, they have to vote on it again and it is resubmitted. Now, I think Mr. Potter, as a matter of fact, has an amendment. I don't know whether it touches that or not. I believe it does." Id. 4797-4798.

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Subsequently, Mr. Mayer offered an amendment to Section 11 which was intended to clarify the situation discussed by Mr. Shepley and Mr. Righter. The debate on this amendment is instructive as to the intention of the Constitutional Convention on the period of time a tax rate increased voted by the people is effective:

"MR. MAYER: I have an amendment.

(Amendment submitted and read as follows:)

AMENDMENT NO. 24. Amend File No. 19, Page 6, Section 11 as amended, line 29, by inserting after the word 'purposes' where said word appears in line 29 the following words: 'for a period not to exceed four years.'

PRESIDENT: Judge Mayer, that word is 'purpose', not 'purposes'.

MR. MAYER: It is 'purposes' in that line.

PRESIDENT: You are right. I was looking at the other. Do you move the adoption of the amendment?

MR. MAYER: I move the adoption of the amendment.

PRESIDENT: Is there a second?

(Motion was seconded by Mr. Hemphill.)

MR. MAYER: Mr. President, I should just simply like to state the purpose of the amendment which is to limit these additional levies to a period of four years. It could be less, of course, if the people wanted to do it, but it could not be for a longer period than four years. I assume that most of these elections to increase the levy would be held along with the general elections, so it would be four years from the time of the general election and it is just a limitation on the time.

MR. PHILLIPS (OF JACKSON): May I interrogate Judge Mayer?

PRESIDENT: Judge, will you yield?

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MR. MAYER: Yes, sir.

MR. PHILLIPS (OF JACKSON): Judge, a few years ago the levy for the school districts of Kansas City and for St. Joseph was for a period of two years and my recollection is that an amendment or a bill was introduced which authorized the levying for not to exceed four years. Now, under the present law St. Joseph as well as Kansas City may submit the levy to the people for one year, two years, three years, or four years. Isn't that correct?

MR. MAYER: Yes.

MR. PHILLIPS (OF JACKSON): And four years is an adequate period generally for a large city to predict its levy?

MR. MAYER: That's right.

MR. PHILLIPS (OF JACKSON): They would make the Constitution then conform very largely to the statute or putting it conversely, the statute could not prescribe a longer period than the Constitution?

MR. MAYER: That's right. Mr. Phillips, I introduced the amendment because some fear was expressed that if one of these levies was voted it could never be unvoted and might be perpetual.

MR. PHILLIPS (OF JACKSON): I think it is a good amendment.

MR. MAYER: To make it clear, I just introduced it for four years." Id. at 4811.

* * *

"MR. SHEPLEY: Mr. President, I would simply like to say this amendment was discussed by Mr. Mayer with myself as Chairman of the Committee during the recess, and while I haven't polled the Committee, I am satisfied that we are all entirely in favor of this

Honorable Harlan A. Gould

amendment, and I think it will lose any doubt that might exist that was raised by Mr. Righter, and I think it is a very proper amendment and should be adopted." Id. at 4812.

* * *

"MR. MANLOVE: Judge Mayer, you probably remember that this question was raised in Committee. At the time it seemed to be the consensus of the idea of the Committee that anything the people voted upon themselves that they inherently had the right to rescind that with another vote. Is that right?

MR. MAYER: Yes, there was some talk of that kind, but there has been considerable doubt expressed on the floor, and I thought this would make it clearer.

MR. MANLOVE: Yes, sir, I agree with that. Now, isn't it a fact, though, that our city elections are held for the purpose of voting the school levies throughout the whole state at special school elections in April of each year?

MR. MAYER: Well, they could still vote it for one year or four years. Under the statute they can do that now. This just makes it clear that this constitutional provision does not interfere with the statute. The statute provides they may increase the levy for from one to four years and this just puts a limit of four years on it.

MR. MANLOVE: In other words, it wouldn't be held by inference that the four years, that it held to the four years in any way at all? In other words, the school board in my town might not say, 'Well, we voted that levy and we voted for four years'?

MR. MAYER: No, it says, 'it shall not exceed four years'.

MR. MANLOVE: Yes, sir, well I agree that it is a good amendment. I heartily support it." Id. at 4813.

* * *

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"PRESIDENT: The question is on Judge Mayer's amendment. As many as favor the amendment, let it be known by saying 'Aye'...Opposed? The ayes have it. The amendment is adopted. Are there other amendments to the section?" Id.

The foregoing is strongly supportive of the conclusion reached above, that an increase in the basic tax rate which is approved by a two-thirds favorable vote of the qualified electors voting thereon is a valid tax rate only for the period authorized by the voters.

Therefore, we conclude that the \$4.47 tax rate approved by the voters of the Kirkwood School District R-7 in 1969, is effective for only one year. A one year increase in the basic tax rate permitted by Section 11(b) is all the voters approved. Upon the expiration of that year, the tax rate for the next year (1970-71 school year) for the district will be limited by Section 11(b) to a maximum of \$1.25 on the hundred dollars assessed valuation unless the voters of the district authorize an increase in the basic rate pursuant to Section 11(c) and Section 164.021.

In your opinion request, reference is made to Opinion No. 249 issued by this office on September 4, 1969, to the Honorable Stephan Burns. The conclusion reached herein is entirely consistent with the opinion reached in Opinion No. 249. The inquiry made of this office by Representative Burns which was answered in Opinion 249, assumed a situation where a school tax rate had been adopted by a two-thirds vote for four years. He inquired whether the voters of a school district could increase the tax rate even further during that four year period. The opinion concluded as follows:

"It is the opinion of this office that a school district may adopt, by the necessary majority required by the Constitution, a proposal to further increase the rate of taxation for a given year or years beyond the rate previously authorized by popular vote for said year or years. It is further the view of this office that should a proposal for further increase in the rate fail to get the necessary majority required, the rate existing at the time of said vote on the proposed further increase is not repealed thereby, but continues in effect for the term previously authorized by popular vote for said year or years." (Emphasis supplied)

Opinion No. 249 concludes that where the voters have authorized an increase in the basic tax rate for four years and a further increase

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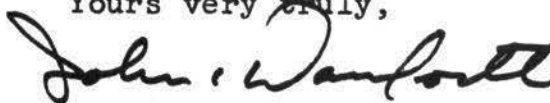
is submitted to the voters and defeated during that four year period, the previously authorized tax rate would continue because the voters had authorized it for a period which had not yet expired. Implicit in Opinion No. 249 is the conclusion that at the end of that four year period the authorization for the increased rate would expire and the maximum rate for the next succeeding year would be as provided in Section 11(b) of Article X unless the voters authorized another increase in the basic rate.

CONCLUSION

Therefore, it is the opinion of this office that pursuant to the terms of Article X, Section 11(c) of the Missouri Constitution and Section 164.021, RSMo 1967 Supp., a tax rate approved by two-thirds of the qualified electors voting thereon pursuant to the first clause of Section 11(c) is a valid increase of the maximum rate of taxation permitted by Section 11(b) of Article X of the Missouri Constitution for the period authorized by the voters (not to exceed four years), and, at the end of the authorized period (not to exceed four years), the increased tax rate expires. The rate for the next succeeding year will be the rate determined by the school board of the district which cannot exceed the limitations contained in Section 11(b), Article X, Missouri Constitution unless the qualified voters of the district have authorized an increase pursuant to the provisions of Section 11(c) Article X, Missouri Constitution and Section 164.021, RSMo 1967 Supp. With reference to the Kirkwood School District R-7, the tax rate of \$4.47 approved by the voters in 1969, is effective for only one year. The tax rate for subsequent years will be limited by the provisions of Section 11(b), Article X, Missouri Constitution, to a maximum of \$1.25 on hundred dollars assessed valuation unless the voters of the district authorize an increase in this basic rate pursuant to the provisions of Section 11(c) of Article X, Missouri Constitution and Section 164.021, RSMo 1967 Supp.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, D. Brook Bartlett.

Yours very truly,



JOHN C. DANFORTH
Attorney General

BAIL: An arresting officer who has no authority to
POLICE OFFICER: accept bail is not authorized to accept a
driver's license in lieu of bail under Section
544.045, RSMo Supp. 1967, from a person arrested for a traffic
violation.

OPINION NO. 366

June 8, 1970

Honorable Patrick J. Hickey
State Representative
4508 St. Leo Lane
St. Ann, Missouri 63074

Honorable Russell Goward
State Representative
4210 A Holly
St. Louis, Missouri 63115



Gentlemen:

This opinion is issued in response to your requests for a ruling concerning the validity of the procedure allegedly presently being followed by the police department of the City of St. Louis pursuant to Section 544.045, RSMo Supp. 1967, which relates to the depositing of drivers' licenses in lieu of bail when persons are arrested and charged with certain traffic violations.

You state that at the present time the police officers of the City of St. Louis upon issuing a summons for a violation of certain traffic ordinances or certain traffic laws require that the person involved surrender his operator's license.

Section 544.045 states in full as follows:

"Any person arrested and charged with violating a traffic law of this state or a traffic ordinance of any county, city, town or village may, at the discretion of the officer authorized by law or rule of court to accept bail, deposit his chauffeur's or operator's license issued by this state with the office demanding bail in lieu of any other security for his appearance in court to answer any such charge, except when the charge is for driving while intoxicated, driving while under the influence of intoxicating liquor or drugs, leaving the scene of

Messrs. Hickey and Goward

a motor vehicle accident, driving when his license is suspended or revoked, or for any charge made because of a motor vehicle accident in which a death has occurred.

"2. The judge, court clerk or other officer requiring security for an appearance shall accept the deposit of the license in lieu of bail and, if the license is accepted, shall issue a receipt to the licensee for the license upon a form approved by the director of revenue. The licensee may, until he has appeared at the proper time and place as stated in the receipt to answer the charge placed against him, operate motor vehicles while in possession of the receipt, and the receipt shall be accepted in lieu of the license as proved by section 302.181, RSMo. If a continuance is requested and granted, the licensee shall be given a new receipt for his license.

"3. If the driver fails to appear at the proper time to answer the charge placed against him, the clerk of the court, or the judge of the court if there is no clerk, shall within ten days notify the director of revenue of the failure to appear, and the director shall thereafter withhold any renewal of the license or the issuance of a duplicate license to the licensee until notified by the court that the charge has been reduced to final judgment."
(Emphasis added)

The statute relative to the police officer authorized to accept bail in the City of St. Louis is Section 84.230, RSMo 1959. This section states in part as follows:

"The Commissioners of police shall cause all persons arrested by the police to be brought before some proper magistrate within said cities, to be dealt with according to law. Proper police officers in charge of police station houses may, if the offense charged against any person is a bailable one, at the request of such person, take from him a recognizance in such sum as may seem to be sufficient and proper with sufficient sureties for his appearance at the proper time before some proper magistrate; . . . "

Messrs. Hickey and Goward

There does not appear to be any rule of court within the meaning of the provisions of Section 544.045, nor does it appear that there is any statutory authorization for an arresting officer to accept bail.

We are of the opinion that it is clear that a person who is arrested for certain traffic violations has the initial option to determine whether or not he will surrender his license in lieu of bail. This determination is subject to the acceptance of the license by and at the discretion of the officer authorized by law or rule of court to accept bail. If the arrested person consents to depositing his license in lieu of bail with the approval of the officer authorized by law or rule of court to accept bail, he is then issued a receipt for his license upon a form approved by the director of revenue, by the judge, court clerk, or other officer requiring security for an appearance. The arresting officer is not authorized by law or rule of court to accept bail; and insofar as the City of St. Louis is concerned, the only police officer authorized to accept bail under these circumstances is the proper police officer in charge of a police station house pursuant to Section 84.230.

With respect to the procedure now allegedly followed in the City of St. Louis; i.e., acceptance of the deposit of a driver's license in lieu of bail by an arresting police officer, we conclude that such procedure is improper and in conflict with provisions of Section 544.045

CONCLUSION

It is the opinion of this office that an arresting officer who has no authority to accept bail is not authorized to accept a driver's license in lieu of bail under Section 544.045, RSMo Supp. 1967, from a person arrested for a traffic violation.

The foregoing opinion, which I hereby approve, was prepared by my assistant John C. Klaffenbach.

Yours very truly,



JOHN C. DANFORTH
Attorney General



JOHN C. DANFORTH
ATTORNEY GENERAL

OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

June 1, 1970

OPINION LETTER NO. 367



Mr. Hubert Wheeler, Commissioner
State Board of Education
Jefferson State Office Building
Jefferson City, Missouri 65101

Dear Mr. Wheeler:

Pursuant to your request of May 26, 1970, we have reviewed, for the purpose of certification, the amendment to Section 2.3.1 of the Missouri State Plan under Title III of the Elementary and Secondary Education Act of 1965, Public Law 89-10 as amended by Public Law 90-247, Section 131, Amendments to Title III of the Elementary and Secondary Education Act of 1965. You advise that this amendment is a completion of a study of educational need and does not effect the operational procedures of the State Plan.

It is the opinion of this office that this amendment to Section 2.3.1 of the State Plan does not alter the previous certification of the State Plan set forth in Opinion Letter No. 317 dated June 30, 1969, and that the State Plan, as amended, can, with respect to the use of federal funds, be carried out in the State of Missouri.

In conjunction with this opinion letter we have completed a certification form which is enclosed herewith.

Very truly yours,

JOHN C. DANFORTH
Attorney General

4.3 Certificate of State Attorney General or
Other appropriate State legal officer

State of Missouri

I hereby certify that this amendment to Section 2.3.1 of the Missouri State Plan (dated June 18, 1969) under Title III of the Elementary and Secondary Education Act of 1965 (Public Law 89-10 as amended by Public Law 90-247, Section 131, Amendments to Title III of the Elementary and Secondary Education Act of 1965) does not alter my previous certification of the State Plan which was dated June 30, 1969 and that the State Plan, as amended, can with respect to the use of federal funds be carried out in the State of Missouri.



(Signed)

State of Missouri
Attorney General

(Title of State Official)

June 1, 1970

(Date)

(Answer by Letter) Klaffenbach

OPINION LETTER NO. 368

June 26, 1970



Honorable Thomas I. Osborne
Prosecuting Attorney
Audrain County Court House
Mexico, Missouri 65265

Dear Mr. Osborne:

This letter is in response to your opinion request in which you inquire as to whether Section 57.430, RSMo Supp. 1967, entitles a sheriff to receive multiple allowances in a situation which the sheriff made one trip to Buchanan County in one motor vehicle and served three warrants issued on separate felony complaints.

Section 57.430, RSMo Supp. 1967, states as follows:

"In addition to the salary provided in sections 57.390 and 57.400, the county court shall allow the sheriffs and their deputies, payable at the end of each month out of the county treasury, actual and necessary expenses for each mile traveled in serving warrants or any other criminal process not to exceed ten cents per mile, and actual expenses not to exceed ten cents per mile for each mile traveled, the maximum amount allowable to be two hundred dollars during any one calendar month in the performance of their official duties in connection with the investigation of persons accused of or convicted of a criminal offense. When mileage is allowed, it shall be computed from the place where court is usually held,

Honorable Thomas I. Osborne

and when court is usually held at one or more places, such mileage shall be computed from the place from which the sheriff or deputy sheriff travels in performing any service. When two or more persons who are summoned, subpoenaed, or served with any process, writ, or notice, in the same action, live in the same general direction, mileage shall be allowed only for summoning, subpoenaing or serving the most remote.

"2. At the end of each month, the sheriff and each deputy shall file with the county court an accurate and itemized statement, in writing, showing in detail the miles traveled by such officer, the date of each trip, the nature of the business engaged in during each trip, and the places to and from which he has traveled. Such statement shall be signed by the officer making claim for reimbursement, verified by his affidavit, and filed by him with the county court. Whenever claim for reimbursement is made by a deputy, his statement shall also be approved in writing by the sheriff. The county court shall examine every claim filed for reimbursement, and if found correct, the county shall pay to the officer entitled thereto, the amount found due as mileage."

We wish to point out that this section is a reimbursement section and authorizes only the actual and necessary expenses for each mile traveled in serving warrants or other criminal process not to exceed 10 cents per mile for each such trip and the claim for reimbursement must be verified by the sheriff and shown in detail and approved by the County Court.

We note that Section 57.430 does not allow the sheriff a flat ten cents per mile for each mile traveled but allows only a maximum of ten cents per mile for actual and necessary expenses for each mile traveled to serve warrants or other criminal process.

Further in our view, it was not the legislative intent to allow duplication in expenses in such a case involving one trip.

Yours very truly,

JOHN C. DANFORTH
Attorney General

TAXATION (SALES AND USE):
TAXATION (EXEMPTIONS):

The Missouri sales tax is not applicable to the sale of books by individuals made through the Raytown Area PTA Council sponsored Student Used Book Exchange.

August 13, 1970

OPINION NO. 369

Honorable Donald L. Manford
Missouri Senate - Eighth District
9409 Oakland
Kansas City, Missouri 64138



Dear Senator Manford:

This is in response to your request for an opinion on the following question:

"During the third week of August 1970, the Raytown Area PTA Council will sponsor a non-profit Student Used Book Exchange. Our objective is to provide a central location and simple process for the families in our school district to easily sell and buy the used books if they so choose. The evaluating (sic) and pricing will be entirely on the individuals independent judgment. Since this is not an attempt to raise funds, but offered as a service, the only fee to be charged will be to cover actual expenses. The question has been raised as to whether state sales tax is applicable in this case. This the (sic) the question we would like to put before you."

Chapter 144 of the Revised Statutes of Missouri contains the sales and use tax law. The provisions of this law applicable to the question presented are as follows:

Section 144.010, RSMo 1969.

"1. The following words, terms and phrases when used in this chapter have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

Honorable Donald L. Manford

*

*

*

"(2) 'Business' includes any activity engaged in by any person, or caused to be engaged in by him, with the object of gain, benefit or advantage, either direct or indirect, and the classification of which business is of such character as to be subject to the terms of this chapter. The isolated or occasional sale of tangible personal property, service, substance, or thing, by a person not engaged in such business does not constitute engaging in business, within the meaning of this chapter. (Emphasis supplied).

*

*

*

"(8) 'Sale at retail' means any transfer made by any person engaged in business as defined herein of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration; provided, however, that for the purposes of this chapter and the tax imposed thereby, purchases of tangible personal property made by duly licensed physicians, dentists and veterinarians and used in the practice of their professions shall be deemed to be purchases for use or consumption and not for resale." (Emphasis supplied).

Section 144.020, RSMo 1969.

"1. A tax is hereby levied and imposed upon all sellers for the privilege of engaging in the business of selling tangible personal property or rendering taxable service at retail in this state. The rate of tax shall be as follows:

"(1) Upon every retail sale in this state of tangible personal property a tax equivalent to three per cent of the purchase price paid or charged, or in case such sale involves the exchange of property, a tax equivalent to three per cent of the consideration paid or charged, including the fair market value of the property exchanged at the time and place of the exchange; except as otherwise provided in section 144.025;" (Emphasis supplied).

Based upon the particular facts presented in your letter, it is the view of this office that the sales made through the Raytown Area PTA Council sponsored Student Book Exchange would be isolated

Honorable Donald L. Manford

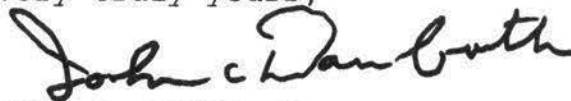
or occasional sales of tangible personal property by persons not engaged in such business within the meaning of Section 144.010(2), RSMo 1969. Accordingly, they do not constitute sales of tangible personal property at retail upon which a tax is imposed by Section 144.020, RSMo 1969.

CONCLUSION

It is, therefore, the opinion of this office that the Missouri sales tax is not applicable to the sale of books by individuals made through the Raytown Area PTA Council sponsored Student Used Book Exchange.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John E. Park.

Very truly yours,

A handwritten signature in black ink, reading "John C. Danforth". The signature is written in a cursive style with a large, prominent "J" and "D".

JOHN C. DANFORTH
Attorney General

SCHOOLS:
TEACHERS:

A teacher who has served only five successive years in the same school system has not achieved "permanent teacher" status pursuant to the definition of "permanent teacher" in Section 168.104(4), RSMo 1969, and therefore, such a teacher would not gain "permanent teacher" status upon being reemployed by that same school district for the second successive year.

NOTE

(A copy of Opinion No. 233, rendered October 24, 1972, to J. William Holliday, should be sent with this opinion) OPINION NO. 371

October 2, 1970

Honorable James P. Mulvaney
State Representative
Twenty-ninth District
5717 Beldon
Jennings, Missouri 63136



Dear Representative Mulvaney:

This is in reply to your letter requesting an interpretation of Section 168.102(3) of Senate Committee Substitute for House Bill No. 120 of the Seventy-fifth General Assembly (which now appears as Section 168.104(4), RSMo 1969) of the Teacher Tenure Law. Your letter reads, in part, as follows:

"I am interested in obtaining an opinion on the following section of the Teacher Tenure Law:

"168.102(3) "Permanent Teacher", any teacher who has been employed or who is hereafter employed as a teacher in the same school district for five successive years and who has continued or who thereafter continues to be employed as a full-time teacher by the school district; except that, when a permanent teacher resigns or is permanently separated from employment by a school district, and is afterwards reemployed by the same school district, reemployment for the first school year does not constitute an

Honorable James P. Mulvaney

indefinite contract but if he is employed for the succeeding year, the employment constitutes an indefinite contract. . . ."

"If the teacher had served five years in a district prior to the tenure law, and if the teacher was separated prior to the tenure law going into effect, would the teacher be a permanent teacher if rehired by that same district for two consecutive years after the tenure law takes effect?"

The part of Section 168.104(4) which must be interpreted to respond to your question is as follows:

"'. . . except that, when a permanent teacher resigns or is permanently separated from employment by a school district, and is afterwards reemployed by the same school district, reemployment for the first school year does not constitute an indefinite contract but if he is employed for the succeeding year, the employment constitutes an indefinite contract. . . .'" (Emphasis supplied.)

To be accorded "permanent teacher" status upon returning to a school system for two years a teacher must have been a "permanent teacher" at the time he separated from the school system.

Pursuant to Section 168.104(4), RSMo 1969, a permanent teacher is a teacher who has taught in the same school district for five successive years and has been reemployed by that district for the sixth successive year. The critical point in time for achieving permanent teacher status is reemployment for the sixth successive year by the same school district. A teacher may have been employed for the sixth successive year either before or after the effective date of the Teacher Tenure Act (July 1, 1970) and thereby be a "permanent teacher" for the purposes of the "except" clause of Section 168.104(4). However, if such a permanent teacher has separated from the district either before or after the effective date of the Teacher Tenure Act, he does not achieve permanent teacher status immediately upon reemployment with the district. The teacher must serve one probationary year and, if reemployed for the succeeding year, regains permanent teacher status in that district.

Applying the foregoing conclusions to the factual situation set forth in your letter, we note that the teacher about

Honorable James P. Mulvaney

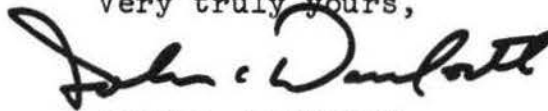
whom you inquire had served only five successive years in the district prior to separation. Under these facts, the teacher in question never qualified for permanent teacher status prior to his separation from the district because he was not reemployed for the sixth successive year. Therefore, this teacher would not have been a permanent teacher when he separated from the district and would not qualify under the "except" clause of Section 168.104(4) for permanent teacher status upon being reemployed by that same district for the second successive year.

CONCLUSION

It is the opinion of this office that a teacher who has served only five successive years in the same school system has not achieved "permanent teacher" status pursuant to the definition of "permanent teacher" in Section 168.104(4), RSMo 1969, and, therefore, such a teacher would not gain "permanent teacher" status upon being reemployed by that same school district for the second successive year.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, D. Brook Bartlett.

Very truly yours,



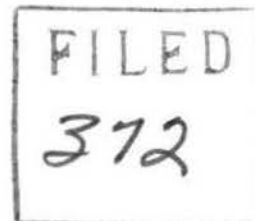
JOHN C. DANFORTH
Attorney General

Answer by Letter (Gardner)

July 27, 1970

OPINION LETTER NO. 372

Honorable D. R. "Ozzie" Osbourn
State Representative
Ninety-ninth District
Box 224
Monroe City, Missouri 63456



Dear Representative Osbourn:

This is in response to your request for an official opinion on the question whether the property of Paris Senior Citizens Housing is exempt from taxation.

From the information submitted with your opinion request, it appears that the property in question consists of a 20 unit apartment house in Paris, Missouri. The apartments are rented to older people who have limited income. You also submitted a copy of the Amended Articles of Incorporation. The structure and purpose of the corporation are set forth in paragraph 5 of the Amended Articles of Incorporation as follows:

"This corporation is organized not-for-profit and the objects and purposes to be transacted and carried on are to promote the general social welfare of the community and for that purpose:

"to acquire, construct, provide, and operate rental housing and related facilities suited to the special needs and living requirements of elderly rural residents of low or moderate income or other rural residents of low income, without regard to race, color, creed, or national origin;

"to acquire, improve, and operate any

Honorable D. R. Osbourn

real or personal property or interest
or rights therein or appurtenant thereto;

"to sell, convey, assign, mortgage, or
lease any real and personal property;

"to borrow money and to execute such
evidence of indebtedness and such con-
tracts, agreements, and instruments as
may be necessary, and to execute and
deliver any mortgage, deed of trust,
assignment of income, or other security
instrument in connection therewith; and

"to do all things necessary and appro-
priate for carrying out and exercising
the foregoing purposes and powers."

It appears from the foregoing that the corporation was organized primarily for the purpose of acquiring and operating the apartment house. The corporation is empowered to borrow money to acquire property and execute a mortgage or deed of trust to secure the indebtedness. Moreover, the corporation is authorized to set its charges at an amount which will not only pay the cost of maintenance and operation and interest on the borrowed money, but additional amounts to take care of principal payments and other items.

Paragraph 7 of the Amended Articles of Incorporation provides that:

". . .The balance, if any, of all money
received by the corporation from its
operations, after the payment in full
of all operating expenses, debts and
obligations of the corporation of what-
soever kind and nature as they become
due, shall be used to make advance
payments on any loans owed by the cor-
poration, . . ."

Thus, it appears that as principal payments are made on indebtedness secured by mortgage or deed of trust, the equity of the corporation will constantly increase.

Article X, Section 6 of the Constitution authorizes the legislature to enact general laws exempting from taxation "all property, real and personal, not held for private or corporate profit and used exclusively . . .for purposes purely charitable. . . ."
Section 137.100 RSMo implements the quoted portion of the Constitution.

Honorable D. R. Osbourn

The basic question therefore is whether the 20 unit apartment owned by the corporation is held for private or corporate profit. It is apparent that if the corporation exercises the powers set forth in the Amended Articles of Incorporation, the corporation will be so operated that charges will not only take care of all operating and maintenance costs, but will be in an amount sufficient to reduce the corporation's indebtedness and to enable the corporation to acquire valuable assets debt free. In such circumstances the rentals would exceed the operating and maintenance costs of the corporation.

The situation then is one in which there is use of the property to make a profit, even though the profit is made for the express purpose of being used to further and accomplish a purely charitable purpose. This was the situation in Defenders' Townhouse, Inc. v. Kansas City, 441 S.W.2d 365 where the court held that a not for profit corporation's property that was used for housing for persons 62 years of age or older was not operated for purposes purely charitable and was not exempt from taxation by the city, when the payments by the residents of the property were used to pay off a loan of the corporation.

This office has held that the property of a private non-profit corporation organized to provide low rent housing for the aged is not exempt from real and personal property taxes under Section 137.100, RSMo if the rentals exceed the operating and maintenance costs of the corporation. A copy of Opinion No. 172 issued on March 17, 1966 to the Honorable Floyd E. Lawson, Prosecuting Attorney, Monroe County, Paris, Missouri is enclosed.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosure:

Op. No. 172
3-17-66, Lawson

enclosed

June 5, 1970

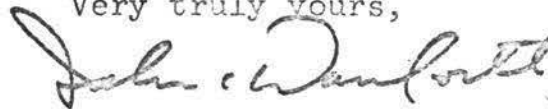
OPINION LETTER NO. 373

Honorable Albert F. Turner
Prosecuting Attorney
Wright County
P. O. Box 110
Mountain Grove, Missouri

Dear Mr. Turner:

This is in answer to your letter of recent date regarding ambulance service in Douglas County. You ask a rather general question, and it is not clear to us just what sort of arrangement is contemplated. However, we believe that your question may well be answered by former opinions of this office, copies of which we are enclosing. Such opinions are: Opinion No. 333 rendered July 30, 1968 to Maurice B. Graham, Opinion No. 254 rendered August 7, 1969 to C. M. Bassman, and Opinion No. 123 rendered August 7, 1969 to Urban C. Bergbauer, Jr.

Very truly yours,



JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 333
7-30-68, Graham

Op. No. 254
8-7-69, Bassman

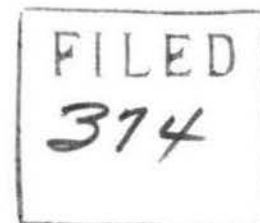
Op. No. 123
8-7-69, Bergbauer, Jr.

Answer by Letter (Klaffenbach)

July 9, 1970

OPINION LETTER NO. 374

Honorable Phil Snowden
State Representative
Eighty-sixth District
3131 Armour Road
North Kansas City, Missouri 64116



Dear Representative Snowden:

This letter is in response to your opinion request concerning the North Kansas City School District Rule 6, Section II-E and whether this rule is constitutional.

The rule in question states as follows:

"The Board of Education may employ both man and wife, but they shall not teach in the same building or same school unit where more than one building is involved (such as the high school). Should the man or wife assume the principalship of one or more buildings, the spouse shall not be assigned to either unit. The wife or husband of a supervisor, principal, or a general administrator shall henceforth not be employed on a contract basis in any position in the school district requiring a professional certificate; nor, shall either the wife or husband of a husband-wife combination employed in the district be hereafter promoted to a supervisory position, principalship, or administrative position so long as one of the husband-wife combination holds a professional contract in the North Kansas City School District. This rule is not retroactive."

Honorable Phil Snowden

We understand that the North Kansas City School District is a six-director school district and under Section 162.331, RSMo Supp. 1967, the board of education, except as otherwise provided, has the same duties and is subject to the same restrictions and liabilities as the boards of common school districts acting under the school laws of the state.

Section 162.811, RSMo Supp. 1967, states:

"The board shall visit the schools under their care, examine into their condition and the progress of the pupils, advise and consult with the teachers, and exercise such supervision as will best promote the interests of the schools."

The board is granted authority to adopt rules and regulations by Section 171.011 RSMo Supp. 1967, which provides:

"The school board of each school district in the state may make all needful rules and regulations for the organization, grading and government in the school district. The rules shall take effect when a copy of the rules, duly signed by order of the board, is deposited with the district clerk. The district clerk shall transmit forthwith a copy of the rules to the teachers employed in the schools. The rules may be amended or repealed in like manner."

We have examined the rule in question, and, in our view it has no constitutional infirmity.

Very truly yours,

JOHN C. DANFORTH
Attorney General

GENERAL ASSEMBLY:
CONSTITUTIONAL LAW:
REFERENDUMS:

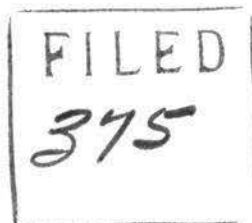
Once a measure is referred to the electorate, the General Assembly has no power to repeal the measure. The Secretary of State must continue

to perform his statutory duties with respect to having the referred measure submitted to the electorate even though the General Assembly has attempted to repeal the measure.

OPINION NO. 375

June 11, 1970

Honorable Robert E. Young
State Representative
District No. 133
State Capitol Building
Jefferson City, Missouri 65101



Dear Representative Young:

This is in reply to your request for an official opinion of this office on two questions:

"[1] . . . Can the General Assembly repeal an act upon which a referendum has been ordered by petition of the people? . . ."

"[2] If a bill ordered to referendum by petition of the people after the bill's passage by the Legislature cannot be repealed before a vote by the people but the Legislature ostensibly repeals the bill before that vote, what then is the duty of the Secretary of State?"

In response to your first question, we find that the Supreme Court of Missouri has addressed itself to this question in the case of *State ex rel. Drain v. Becker*, 240 S.W. 229 (Mo. 1922). In that case Judge Walker, in the opinion of the court wrote:

"It seems to be contended, although not so expressed in words, that the right of reference reserved to the people may be forestalled or nullified by legislative action before the referred measure has been voted upon. . . . This is a mistake. The powers of the General Assembly are in no wise limited by the constitutional provision until the right of referendum has been invoked; thereafter it is divested of all power in regard to the matter referred until the action of the people has been exercised by a vote upon same. . . . [T]he General Assembly, after

Honorable Robert E. Young

the right of reference has been invoked, cannot interfere with a referred measure by the passage of another on the same subject until after the one referred has been voted upon by the people and their power in that respect exhausted." 240 S.W. at 232.

In a concurring opinion, Judge Graves also agreed that the legislature could not repeal a law after it had been referred to the people. He observed:

" . . . The election would be an absurd and useless thing, if the General Assembly could repeal the law and enact another in lieu thereof. The declaration that the measure should become effective upon a favorable vote would be idle language, if the General Assembly could repeal it, between the date of the reference and the date of the election." 240 S.W. at 235.

It should be noted that three judges of the court dissented from the views expressed by Judge Walker and Judge Graves. However, since the majority of the court held in *State ex rel. Drain v. Becker*, supra, that the legislature is divested of all power to act on a measure referred to the people until the people have voted on the measure, we find that the law is settled on this point. We therefore hold that the legislature has no power to repeal a measure to be submitted to the electorate at a referendum election before the referendum election occurs.

With respect to your second question, in view of our answer to the first question, the Secretary of State should continue to follow procedures set out in Chapter 126, RSMo 1959, which sets out his duties with respect to a measure referred to the electorate. On the authority of *State ex rel. Drain v. Becker*, supra, he has no right to refuse to perform his statutory duties with regard to a measure referred to the electorate merely because the General Assembly has attempted to repeal the measure.

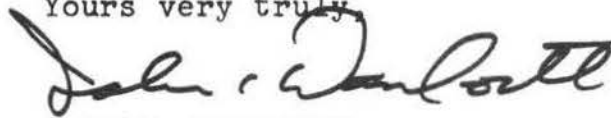
CONCLUSION

It is the opinion of this office that once a measure is referred to the electorate, the General Assembly has no power to repeal the measure. The Secretary of State must continue to perform his statutory duties with respect to having the referred measure submitted to the electorate even though the General Assembly has attempted to repeal the measure.

Honorable Robert E. Young

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Charles A. Blackmar.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being more prominent and the last name "Danforth" written in a more compact, cursive style.

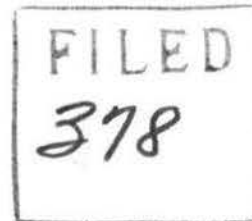
JOHN C. DANFORTH
Attorney General

Answered by letter-Wieler

OPINION LETTER NO. 378

June 23, 1970

Mr. B. W. Robinson
Assistant Commissioner
Director, Vocational Education
Department of Education
Jefferson State Building
Jefferson City, Missouri 65101



Dear Mr. Robinson:

This is in answer to your request for our review of the annual revision of the State Plan for Vocational and Technical Education in Missouri, said revision being necessary under the provisions of the Vocational Education Act of 1963, Public Law 88-210, as amended in 1968 by Public Law 90-576 (20 U.S.C., Section 1241 et. seq.).

It is the opinion of this office that the Missouri State Board of Education is the "state board" in this state within the meaning of Section 108(8) of Public Law 90-576. Also, we find that the Missouri State Board of Education has the authority under state law to submit a State Plan for Vocational Education and to administer or supervise the administration of same. See Sections 178.420 to 178.580, RSMo Supp. 1967. Further, we think that the provisions of this Plan can be carried out by the state; and we note that the Commissioner of Education has been duly authorized by the Missouri State Board of Education to submit the State Plan for Vocational and Technical Education in Missouri and to represent the Missouri State Board of Education in all matters pertaining thereto. See Section 178.540, RSMo Supp. 1967.

In conjunction with this letter opinion which constitutes our official certification of the application, we have completed the required certification form.

Yours very truly,

JOHN C. DANFORTH
Attorney General

answer by letter-Blackmar, A.

June 17, 1970

OPINION LETTER NO. 379

Honorable James C. Kirkpatrick
Secretary of State
State of Missouri
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Kirkpatrick:

Pursuant to your request of June 5, 1970, and pursuant to the directive found in Section 125.030, RSMo 1959, I hereby submit a ballot title for House Joint Resolution No. 1, Third Extraordinary Session, 75th General Assembly, an amendment to Article X of the Constitution substituting thereto a section to be known as Section 11(c). The ballot title is:

Provides tax rate for school district not proposing higher rate shall be last tax rate approved by voters; in district where proposed higher rate is defeated by voters, tax rate remains last rate approved; provides a school board may levy a lower tax rate than approved by the voters.

Yours very truly,

JOHN C. DANFORTH
Attorney General

MUNICIPAL AIRPORTS:
CITIES, TOWNS & VILLAGES:
AIRPORTS:
COOPERATIVE AGREEMENTS:

The mayor of a constitutional charter city may not, without an enabling ordinance, contract with an adjoining state for the construction of an airport.

OPINION NO. 381

June 19, 1970

Honorable Walter L. Meyer
State Representative
District No. 27
9495 Yorktown Drive
Bellefontaine Neighbors, Missouri 63137



Dear Representative Meyer:

You have requested an official opinion as to the authority of the mayor of a first class city, not within a county, to contract with a bordering state. You have informed us by telephone that the city in question is St. Louis, a constitutional charter city, not a first class city, and that the subject of the contract is construction of an airport by the city and the State of Illinois.

The charter of the City of St. Louis vests the city with power to contract and to exercise all powers granted by law (Article I, Section 1 (4), (35), Charter of St. Louis). The legislative power of the city is vested in the Board of Aldermen (Article IV, Section 1, Charter of St. Louis).

"The board of aldermen shall have power by ordinance not inconsistent with this charter to exercise all the powers of the city and provide all means necessary or proper therefor; . . ." (Article IV, Section 23, Charter of St. Louis)

The mayor is designated the chief executive officer and is given all executive power of the city (Article VII, Section 1, Charter of St. Louis).

Section 305.170, RSMo, authorizes the local legislative body of any city to acquire, construct, own and operate airports, and to do so alone or jointly with others, and either within or without the limits of the city.

Section 305.240, RSMo, authorizes the governing body of any political subdivision to acquire, construct, own and operate airports in an adjoining state subject to the laws of this state in all matters relating to financing such projects.

Honorable Walter L. Meyer

The Supreme Court of Missouri in *Dysart v. City of St. Louis*, 11 S.W.2d 1045 (Mo. en banc 1928) upheld the power of the city by ordinance to issue bonds for the financing of an airport pursuant to the Charter of St. Louis, Article I, Section 1, Paragraphs 8, 15, 32, 33 and 35; Article I, Section 2.

Any municipality or political subdivision of this state may contract and cooperate with a duly authorized agency of another state for the construction, acquisition or operation of any public improvement or facility if the subject and purposes of the contract are within the scope of the municipality's or political subdivision's independent powers (Section 70.220, RSMo; Article VI, Section 16, Constitution of Missouri, 1945). A municipality exercising this power must do so by duly enacted ordinance (Section 70.230, RSMo).

Accordingly, it is my opinion that the Board of Aldermen of the City of St. Louis may by ordinance authorize a contract between the City of St. Louis and the State of Illinois for construction of an airport, either within or without the limits of the city or within this state or the State of Illinois. It is also my opinion that the mayor of the City of St. Louis, without such an ordinance, may not enter into such a contract (*Lockwood v. Wabash R. Co.*, 26 S.W. 698, 700 (Mo. 1894)).

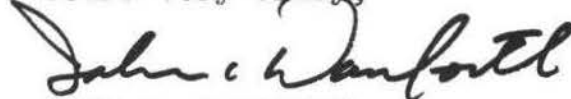
"The mayor's permit alone conferred no authority on defendant to occupy the street with railroad tracks, and operate trains drawn by locomotives over it. The sole power to grant such a franchise is vested in 'the mayor and assembly' by article 3, § 26, par. 11, of the Scheme and Charter, and can be exercised only by an ordinance duly enacted for that purpose; . . ."

CONCLUSION

It is the opinion of this office that the mayor of a constitutional charter city may not, without an enabling ordinance, contract with an adjoining state for the construction of an airport.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Lauren R. Wood.

Yours very truly,



JOHN C. DANFORTH
Attorney General

ELECTIONS:
PRIMARY ELECTIONS:
CHALLENGERS:

1. Precinct election judges in Kansas City can recognize an inside challenger for a political party who is vouched for by judges representing that party or by persons present belonging to that party where the challenger with the duly signed credentials of the party chairman has not put in an appearance at the polling place. 2. A challenger recognized by the election judges maintains his position as challenger only until such time as a challenger with credentials from the party chairman presents himself at the polling place. 3. A form purporting to be an appointment of an inside challenger by the election judges for the rest of the election day because no authorized inside challenger has presented himself at the polling place does not meet legal requirements.

OPINION NO. 383

July 21, 1970

Honorable Phillip P. Scaglia
State Representative
District No. 15
5101 Brookwood
Kansas City, Missouri 64110



Dear Representative Scaglia:

This is in response to your request for an opinion concerning the authority of precinct election judges in Kansas City to select inside challengers at the polls when the inside challenger, who has been duly authorized to act as challenger by his respective party chairman, is unavailable. Specifically, you ask the following questions:

1. If challengers with duly signed credentials do not appear within 30 minutes after the polls open, can the election judges select an inside challenger who is vouched for by judges representing that party or by person or persons present belonging to that party?
2. If the election judges do select such a person, can this person be replaced by a person or persons who subsequently appear with duly signed credentials?
3. Does the enclosed form, purporting to be an appointment of an inside challenger by the election judges because no authorized inside challenger has presented himself, meet legal requirements?

Honorable Phillip P. Scaglia

Section 117.590, RSMo 1959, provides:

"At every registration and election, each one of the political parties shall have the right to designate and keep a challenger at each place of registration and voting who shall be assigned such position immediately adjoining the officers in charge of registration or the election inside the polling or registration booth as will enable him to see each person as he offers to register or vote and who shall be protected in the discharge of his duty by the judges of election and the police. An authority, signed by the recognized chairman or presiding officer of the chief managing committee of a party in any such city, shall be sufficient evidence of the right of the challenger for such party to be present inside the registration or polling place. But in any case, any challenger does not or cannot produce the authority of such chairman, it shall be the duty of such judges of election to recognize a challenger that shall be vouched for and presented to them by the persons present belonging to such political party, or who shall be vouched for by the judge representing such party. The chairman of the managing committee of each political party for such city may remove any challenger appointed by him and substitute another in his place. The challenger so appointed and admitted to the room where such ballot box is kept shall have the right and privilege of remaining during the canvass of the votes and until the returns are duly signed and made. Each political party shall also have the right to a challenger placed conveniently outside of the polling booth, but not in the way of the voters. . . ."

It is clear that the legislature created the position of challenger as an attempt to insure honest elections. By designating and maintaining challengers in each polling place, a party can protect itself against election irregularities. A challenger has the authority to present questions on behalf of his party both as to the integrity of the election process and as to the qualifications of voters. The challenger is supposed to be an integral part of the election process.

Honorable Phillip P. Scaglia

The statute also indicates that fundamentally and primarily the selection and designation of challengers is to be done by the party chairman. It expressly provides that written authority by the recognized chairman or presiding officer of the chief managing committee of a party shall be sufficient evidence of the right of the challenger for such party to be present inside the registration or polling place. It also allows the party chairman to remove any challenger appointed by him and substitute another in his place. The statute further provides that the election judges shall recognize a challenger for a party in any instance where a challenger does not or cannot produce the written authority of his party chairman.

In view of the legislative expression that the presence of party challengers is deemed to be helpful in conducting honest elections and in view of the statutory provisions for substitution in the event a challenger does not or cannot produce the authority of his party chairman, it is our opinion that the election judges in Kansas City can select an inside challenger for a party who is vouched for by judges representing that party or by persons present belonging to that party where the challenger appointed by the party chairman has not put in his appearance at the polling place and presented his credentials to the election judges after the polls have opened.

However, the statute does not give the election judges the authority to appoint a challenger, only the authority to recognize a challenger in any case where a challenger does not or cannot produce the written authority of his party chairman. This being so, it is our opinion that the election judges have a right to recognize a challenger who shall act as a challenger only until such time as the challenger properly appointed by the party chairman puts in an appearance and presents his duly signed credentials. At this point, the challenger with the written authority of the party chairman replaces the challenger recognized by the election judges.

In view of our opinion, we cannot approve of the form enclosed in your request which purports to be an appointment of an inside challenger by the election judges because no authorized inside challenger has presented himself. Specifically, we disapprove of this form because it purports to appoint a challenger for the rest of the election day, whereas we have held in our opinion that a challenger can only be recognized by the election judges until such time as a challenger with duly signed credentials from the party chairman presents himself at the polling place.

Honorable Phillip P. Scaglia

CONCLUSION

It is the opinion of this office that:

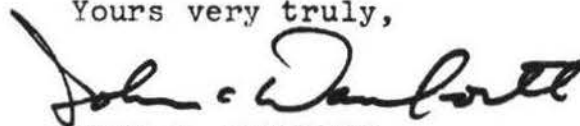
1. Precinct election judges in Kansas City can recognize an inside challenger for a political party who is vouched for by judges representing that party or by persons present belonging to that party where the challenger with the duly signed credentials of the party chairman has not put in an appearance at the polling place.

2. A challenger recognized by the election judges maintains his position as challenger only until such time as a challenger with credentials from the party chairman presents himself at the polling place.

3. A form purporting to be an appointment of an inside challenger by the election judges for the rest of the election day because no authorized inside challenger has presented himself at the polling place does not meet legal requirements.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Richard L. Wieler.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

Answer by letter-Wieler

July 21, 1970

OPINION LETTER NO. 385

Honorable James P. Mulvaney
State Representative
District No. 29
5717 Beldon
Jennings, Missouri 63136



Dear Representative Mulvaney:

This is in response to your request for an opinion concerning the constitutionality of the imposition of a tax for fire protection services on the residents of a certain subdivision by two separate and distinct entities.

In connection with this request, you have detailed the following facts:

The Shannon Ridge subdivision was annexed by the City of Jennings, Missouri, on February 10, 1956. At the time of such annexation, Shannon Ridge was located within the Moline Fire Protection District. The residents of this subdivision have petitioned the Board of Directors of the Moline Fire Protection District for exclusion from that district pursuant to Section 321.310, RSMo 1959. A hearing on this matter was held December 3, 1969. Subsequently, the fire protection district has declined to exclude the Shannon Ridge residents from its jurisdiction. As a result, fire protection services are available to the subdivision from two sources, the City of Jennings and the Moline Fire Protection District. However, the residents of this subdivision are subject to tax for this service from both entities.

With respect to the above fact situation, you have outlined the following questions:

- "1. Are there further legal remedies available to the Shannon Ridge residents, not withstanding, that there is no provision for

Honorable James P. Mulvaney

appeal from the decision of the Moline board, under Section 321.310, RSMo?

- "2. Is any constitutional provision violated by the imposition of a tax on the Shannon Ridge residents for fire protection services by two separate and distinct jurisdictions, namely, the City of Jennings and the Moline Fire Protection District? If so, to which of the two jurisdictions must the Shannon Ridge residents pay taxes for their fire protection service?"

In response to your first question, it is our opinion that it cannot be answered by this office inasmuch as it involves remedies to be used by private individuals seeking adjudication of individual rights. This is a matter for private counsel and not a proper subject for an opinion. See Section 27.040, RSMo 1959.

In answer to your second question, it is our opinion that the imposition of a tax on the residents of the Shannon Ridge subdivision for fire protection services by two separate and distinct jurisdictions does not violate any constitutional provisions. Article X, Section 1 of the Missouri Constitution provides that the taxing power may be exercised by political subdivisions in this state under the power granted to them by the general assembly. Under Section 321.230, RSMo 1959, the Moline Fire Protection District has the authority to levy and collect ad valorem taxes on property located within the district. Likewise, Chapter 94 of the Revised Statutes of Missouri provides statutory authorization for cities of the third class to levy and collect taxes for city purposes. It is our understanding that Jennings is a third class city and would therefore have the power to provide fire protection services pursuant to Section 77.190, RSMo 1959. The taxing power of the fire protection district is coextensive with the geographical boundaries of that district, and the taxing power of the city is coextensive with the city limits. The taxing powers and the boundaries limits of these two public corporations are fixed and established by general law.

Absent any statutory provisions, the taxing power of these two public corporations are not changed by operation of law merely as a result of the extension of the city limits. The only provision in the statutes dealing with the exclusion of city annexed property from fire protection districts is Section 321.320, RSMo 1959, which provides that any property located within the boundary of a fire protection district in a first class county which is now or hereafter included within a city having a population of 40,000 inhabitants or more, and which city is not wholly within the fire

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protection district and maintains a city fire department, is excluded from the fire protection district. In *Inter-City Fire Protection Dist. of Jackson County v. Gambrell*, 360 Mo. 924, 231 S.W.2d 193 (En Banc 1950), the Missouri Supreme Court held that taxes assessed by a fire protection district on property annexed by the City of Independence should have been extended on the tax books of the county by the county court as the law excluding this property from the district had not yet become effective. Therefore, it is clear that the residents of the Shannon Ridge subdivision are not relieved from taxes levied by the Moline Fire Protection District simply because of their annexation to the City of Jennings, unless such annexation comes within the provisions of Section 321.320. It is our understanding that it does not because the City of Jennings has a population of less than 40,000.

The question of the constitutionality of imposing a tax for the same or similar services by two separate taxing authorities was raised in *St. Louis County Library District v. Hopkins*, 375 S.W.2d 71 (Mo. 1964). In that case, the City of Florissant had annexed property lying in the St. Louis County Library District. The residents therein were therefore subject to a tax for the maintenance of a public library by both the City of Florissant and the St. Louis County Library District. Faced with the argument that the imposition of a tax for county library purposes on property annexed by a city maintaining a public, tax supported library was unconstitutional, the Missouri Supreme Court said (l.c. at 77):

"We find no constitutional impediment. The two taxes in question are imposed by law by two separate taxing authorities, the city library and the county library district. The two taxes would be applied uniformly to the area within the respective districts, both of which include the annexed area. 'The principle of uniformity is not violated by levying taxes by two overlapping taxing districts on the same property for similar purposes.' 1 Cooley, *Taxation*, Fourth Ed., § 324. The requirements of equality in taxation are met. The burden of the county library district tax falls equally and impartially upon all of the persons and property subject to it. 84 C.J.S. *Taxation* § 22 b., p. 77."

Therefore, we are of the opinion that the imposition of a tax on the residents of the Shannon Ridge subdivision by both the City of Jennings and the Moline Fire Protection District for fire protection services does not violate any constitutional provision.

Yours very truly,

JOHN C. DANFORTH
Attorney General

COUNTY COLLECTORS:
COMPENSATION:
CONSTITUTIONAL LAW:

Collectors of third class counties wherein the total amount of taxes levied for any one year exceeds four million dollars can retain all commissions and fees earned by them.

OPINION NO. 386

September 18, 1970

Honorable Haskell Holman
State Auditor
State of Missouri
Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Holman:

This is to acknowledge receipt of your request for an opinion from this office which reads in part as follows:

". . . Pertaining to compensation retainable by collectors of third class counties, whose term of office began on the First Monday of March 1967, coming within the classification of subsection (15) of Section 52.260 Cumulative Supplement 1967.

"Section 52.270 Cumulative Supplement 1967 determines the maximum amount of current commissions and fees to be retained by a collector or ex-officio collector coming within the classifications indicated in subsections 1 through 14 of Section 52.260. However, no provision is found in Section 52.270 pertaining to limit of amount retainable by a collector coming within the classification, 'In counties wherein the total amount levied for any one year exceeds four million dollars, ****' as contained in the provisions of Subsection 15 of Section 52.260.

Honorable Haskell Holman

"The question arising from this situation is as follows:

"1. Are collectors of all counties of the third class wherein the total amount of taxes levied for any one year exceeds four million dollars entitled to retain, without limitation, all commissions and fees earned by them?"

Section 52.260, RSMo 1969, is relevant to the issue presented and reads in part as follows:

"The collector in counties not having township organization shall collect and retain the following commissions for collecting all state, county, bridge, road, school and all other local taxes, including merchants', manufacturers' and liquor and beer licenses, other than back, delinquent and ditch and levee taxes, and the commissions constitute his compensation except in counties where the collector is paid a salary in lieu of fees:

* * *

"(15) In counties wherein the total amount levied for any one year exceeds four million dollars, a commission of one percent on the amounts collected."

Senate Bill No. 259 of the Seventy-second General Assembly became effective on October 13, 1963, and effected a repeal of Section 52.260, RSMo 1959, and an enactment of a new section to be known as 52.260 which specifically included subsection 15. As indicated in your opinion request, Section 52.270, RSMo 1969, imposes limitations on the amount of commissions retained by collectors in third class counties in the classifications indicated in subsections (1) through (14) of Section 52.260, RSMo 1969, but makes no references to collectors who come within subsection (15).

In Opinion of the Attorney General No. 303, Speer, 9-4-63, it was held that Senate Bill No. 259 which specifically included subsection (15), would not during the term of the collectors of third and fourth class counties then in office, authorize the payment to such collectors of compensation in excess of that authorized to be retained by collectors under the provisions of Section 52.270, RSMo, for the reason that such action would constitute a violation of Section 13, Article VII of the Missouri Constitution

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of 1945. (Copy of Opinion attached). It should be noted, however, that the following comment was made on page 3 of the opinion:

"Since Subdivision (15) applies to all counties wherein the 'total amount levied for any one year exceeds four million dollars. . .', it is conceivable that it could apply to counties of the third and fourth class. Because the collectors in those counties are compensated by commissions, it is possible that Senate Bill No. 259 could cause an increase in their compensation by making the provisions as to limitations on the amount of commissions collectors are allowed to retain found in Section 52.270, 1961 Cum. Supp., inapplicable to such collectors. . . ."

We are therefore persuaded that Section 52.270, RSMo 1969, does not place a limitation on commissions and fees earned by collectors of all counties of the third class, coming within the classification of subsection (15) of Section 52.260, RSMo 1969.

In addition, it is our view that Section 13, Article VII, Constitution of Missouri, 1945, the prohibition against an increase in an officer's compensation during his term of office, would not apply to collectors of third class counties whose term of office began on the first Monday of March 1967. Section 52.010, RSMo 1969, provides that the collector of revenue, shall be elected in each of the counties of this state, except counties under township organization, for four years. Section 52.015, RSMo 1969, provides that the terms for which collectors are elected expire on the first Monday in March of the year in which they are required to make their final settlement for the tax book collected by them. Therefore, under the factual situation presented, Senate Bill No. 259 which specifically included subsection 15 and which became effective on October 13, 1963, would apply only to collectors of third class counties whose term of office commenced on March 1, 1963. There is authority for this proposition in the case of State ex rel Emmons v. Farmer, (Mo. Sup. 1917), 196 S.W. 1106, 1109 (4) where it was held that the constitutional provision forbidding an increase or decrease of compensation during a term of office has reference to the period fixed as a "term" by the statute only, and in no way refers to the individual who may happen to be the incumbent for more than one term. The court further pointed out that each official term stands by itself.

CONCLUSION

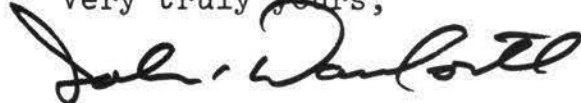
It is the opinion of this office that collectors of third

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class counties wherein the total amount of taxes levied for any one year exceeds four million dollars can retain all commissions and fees earned by them.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, B. J. Jones.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

JOHN C. DANFORTH
Attorney General

Enclosure:

Op. No. 303
9-4-63, Speer

COUNTY COLLECTOR:
COUNTY CLERK:
COMPENSATION:

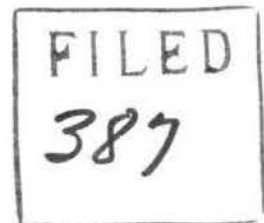
1. A person appointed by the county clerk under Section 52.180, RSMo, in case of death, resignation, removal or other disability of a county collector

to examine the tax books, ascertain the amount remaining uncollected and make out a correct abstract of the same is entitled to be compensated for his services by the county. 2. Persons appointed by the legal representative or sureties of the collector to perform such duties are not entitled to be compensated by the county.

OPINION NO. 387

August 7, 1970

Honorable Haskell Holman
Auditor of Missouri
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Holman:

This is in response to your request for an opinion as follows:

"1. When a vacancy occurs in the office of County Collector and persons are appointed by the County Clerk, by legal representatives of the Collector and by the sureties of the Collector, are said appointees entitled to receive compensation and expense reimbursement from county revenue funds for the services required to be performed by them as contained in the provisions of Section 52.180 RSMo.?"

"2. In the event the only appointee is that made by the County Clerk, would the compensation and expenses for his services be paid by the county?"

Section 52.180, RSMo, to which you refer provides in part:

"In case of the death, resignation, removal or other disability of any county collector, during the time the tax books are in his hands, and before the time specified for making settlements, the county clerk shall demand and take charge of the tax books. Said clerk shall appoint one competent person, the legal representatives of the collector may choose a second, and the sureties of the collector may

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choose a third, and the persons so appointed and chosen shall examine said tax books, and it shall be their duty to ascertain the amount remaining uncollected, and make out a correct abstract of the same. If the representatives or sureties of such collector shall fail or refuse to choose persons to make such examination, then the person appointed by the county clerk shall proceed to make the same and report the same to the county clerk, provided, that should there be but a small portion of the taxes collected at the time of the death of the collector, then the amount actually collected shall be ascertained and the same books used in completing the collections."

Under this statute it is mandatory that the county clerk appoint a competent person to perform the duties required by this statute. It is discretionary for the legal representative and sureties of the collector to appoint someone to represent them. The county clerk is not authorized to appoint persons to represent the collector or the sureties when the legal representative or sureties of the collector fail or refuse to do so. In fact, the statute provides for the person appointed by the county clerk to proceed to make the examination of the tax books and report the results to the county clerk when the legal representative or sureties of the collector fail to do so. This statute is silent as to whether compensation is to be paid to the persons appointed by the county clerk or by the representative and sureties of the collector. Attention is called to the fact that under this statute the county clerk is not required to perform these duties but he is required to appoint some other person to do the work and report the results to him. The question of compensation to be paid a public officer for additional duties is not involved in this matter because the county clerk is not required to do the work. The person appointed by the county clerk is required to perform the duties of auditing the books and reporting the results to the county clerk. He is not vested with any sovereign functions of the government or any discretionary power. He is not a county officer. *State ex rel. Pickett v. Truman*, 64 S.W.2d 105.

When a statute requires certain work to be performed for the benefit of the county and authorizes someone to be appointed or employed to perform such work, it impliedly authorizes such person to be compensated for his services by the county. *Aslin v. Stoddard County*, 106 S.W.2d 472. It is our view that the person appointed to examine the tax books as required under Section 52.180 is to be compensated by the county. *Copp v. St. Louis County*, 34 Mo. 383.

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The persons appointed by the legal representative or sureties of the collector are not employed by the county. In the absence of a statute authorizing them to be compensated by the county, they are not entitled to any compensation from the county. King v. Maries County, 297 Mo. 488, 249 S.W. 418.

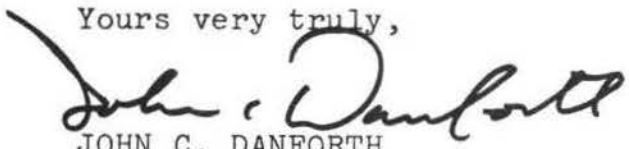
CONCLUSION

It is the opinion of this office that:

1. A person appointed by the county clerk under Section 52.180, RSMo, in case of death, resignation, removal or other disability of a county collector to examine the tax books, ascertain the amount remaining uncollected and make out a correct abstract of the same is entitled to be compensated for his services by the county.
2. Persons appointed by the legal representative or sureties of the collector to perform such duties are not entitled to be compensated by the county.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

Yours very truly,


JOHN C. DANFORTH
Attorney General

CONSTITUTIONAL LAW:
EMERGENCY CLAUSE:
SCHOOLS:

Section A of Senate Bill No. 3, Third Extraordinary Session, 75th General Assembly, qualifies under Sections 29 and 52(a) of Article III of the Missouri Constitution as a valid emergency clause and Senate Bill No. 3 will become effective upon approval by the Governor.

OPINION NO. 388

June 19, 1970

Mr. John C. Vaughn
Comptroller and Budget Director
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Vaughn:

This official opinion is issued in response to your request for a ruling on the following question:

"Does Section A of Senate Bill No. 3, providing that the Act is an emergency measure, qualify as such under Section 29 of Article III of the Constitution and under provisions of Section 1.130 RSMo, 1959?"

You provided the following background information in your opinion request:

"In the Seventy-fifth General Assembly a provision for the payment of State funds to public school districts was enacted. Part (7) of Section 163.031 of Senate Bill No. 1, 185, and 215 made provisions for the payment to school districts, based on a formula, the amount of \$234 million. Section 163.081, RSMo, provides that:

'The state board of education . . . shall calculate the the amount of each school district is to receive and on or before September fifteenth of each year shall distribute all moneys available August thirty-first to the several districts. Additional distribution of all moneys available November thirtieth and February twenty-eighth shall be made on or before December fifteenth and March fifteenth of each school year. . .'

Mr. John C. Vaughn

"The State Board of Education made distribution of moneys available on the dates set forth in this statute, and with the March distribution public schools of this state have received approximately 96 percent of their entitlements. Your office has recently ruled that the Comptroller has no authority to honor a requisition from the State Board of Education providing for a fourth distribution of moneys to public schools which would enable the State Board of Education to distribute the amount as provided in Section 163.031."

The full text of Senate Bill No. 3, Third Extra Session, Seventy-fifth General Assembly, is as follows:

"Section 1. In addition to the distributions of state aid to the public schools prescribed by section 163.081, RSMo, for the 1969-1970 and 1970-1971 fiscal years only, an additional distribution of such moneys as are necessary to provide two hundred thirty-four million dollars shall be made not later than June 15, 1970, and such moneys as are available in the public school moneys fund on May thirty-first of 1971 shall be distributed not later than June 15, 1971.

"Section A. Because there is a serious shortage of funds for the public schools of this state, and because adequate funding of the public schools is a matter of extreme importance to the people of this state, this act is deemed necessary for the immediate preservation of the public health, welfare, peace and safety, and is hereby declared to be an emergency act within the meaning of the constitution, and this act shall be in full force and effect upon its passage and approval."

Two sections of the Missouri Constitution must be considered in analyzing the effectiveness of an emergency clause. Section 29 of Article III states as follows:

"Effective date of laws--exceptions--procedure in emergencies and upon recess.--No law passed by the general assembly shall take effect until ninety days after the adjournment of the session at which it was enacted, except an appropriation

Mr. John C. Vaughn

act or in case of an emergency which must be expressed in the preamble or in the body of the act, the general assembly shall otherwise direct by a two-thirds vote of the members elected to each house, taken by yeas and nays; provided, if the general assembly recesses for thirty days or more it may prescribe by joint resolution that laws previously passed and not effective shall take effect ninety days from the beginning of such recess." [Emphasis supplied]

Section 52(a) of Article III, providing for a referendum reads as follows:

"Referendum -- exceptions -- procedure.-- A referendum may be ordered (except as to laws necessary for the immediate preservation of the public peace, health or safety, and laws making appropriations for the current expenses of the state government, for the maintenance of state institutions and for the support of public schools) either by petitions signed by five per cent of the legal voters in each of two-thirds of the congressional districts in the state, or by the general assembly, as other bills are enacted. Referendum petitions shall be filed with the secretary of state not more than ninety days after the final adjournment of the session of the general assembly which passed the bill on which the referendum is demanded." [Emphasis supplied]

Sections 29 and 52(a) are implemented by Section 1.130, RSMo 1959, which provides:

"Effective date of laws.--A law passed by the general assembly takes effect ninety days after the adjournment of the session at which it is enacted; but if the general assembly recesses for thirty days or more, it may prescribe by joint resolution that laws previously passed and not effective take effect ninety days from the beginning of the recess, subject to the following exceptions:

"(1) A law necessary for the immediate preservation of the public peace, health or safety,

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which emergency is expressed in the body or preamble of the act and which is declared to be thus necessary by the general assembly, by a vote of two-thirds of its members elected to each house the vote to be taken by yeas and nays, and entered on the journal, or a law making an appropriation for the current expenses of the state government, for the maintenance of the state institutions or for the support of public schools, takes effect as of the hour and minute of its approval by the governor; which hour and minute may be indorsed by the governor on the bill at the time of its approval;

"(2) In case the general assembly, as to a law not of the character herein specified, provides that the law takes effect on a date in the future subsequent to the expiration of the period of ninety days herein mentioned the law takes effect on the date thus fixed by the general assembly;

"(3) In case the general assembly provides that any law takes effect as provided in subdivision (1) of this section, the general assembly may provide in such law that the operative date of the law or parts of the law takes effect on a date subsequent to the effective date of the law." [Emphasis supplied]

Section 52(a) reserves to the people, for a period of ninety days after adjournment of the session of General Assembly at which a bill is enacted, the right of referendum over all bills except those "... necessary for the immediate preservation of the public peace, health or safety, and laws making appropriations for the current expenses of the state government, for the maintenance of state institutions and for the support of public schools. . . ." Section 29 provides that no law shall take effect until ninety days after adjournment of the session in which it was enacted except "... an appropriation act or in case of an emergency. . . ." Section 1.130 implements these constitutional provisions and in subparagraph (1) thereof sets forth those laws which become effective immediately upon being approved by the Governor.

Does Senate Bill No. 3 fall within any of the exceptions to the general rule that laws become effective only after the passage of ninety days? More specifically is Senate Bill No. 3 "a law making an appropriation . . . for the support of public schools," or is it "a law necessary for the immediate preservation of the public peace, health or safety"?

I

Senate Bill No. 3 is not a law making an appropriation for the support of public schools.

Even though Section A of Senate Bill No. 3 purports to make it effective immediately on the ground that it is an emergency measure, the same result would occur if Senate Bill No. 3 is a law making an appropriation for the support of public schools. However, Senate Bill No. 3 must be an appropriation bill in the true sense to come within this exclusion. State ex rel. Harvey v. Linville, 318 Mo. 698, 300 S.W. 1066 (1927). The relator in this case, a school superintendent, contended his salary should be computed in accordance with a law enacted by the Missouri legislature a few days before he was elected. Whether the law was in effect at the time of relator's election depended upon (1) the validity of the emergency clause appended to the law or (2) whether it was an appropriation law for the support of the public schools. The court, after deciding that the emergency clause was invalid, disposed of relator's argument that it was an appropriation law as follows:

" . . . It is evident that the provision relating to laws making appropriations for the current expenses of the state government, for the maintenance of state institutions, and for the support of public schools, means that the word 'appropriation' applies to each of those conditions; that is, it must be an act making appropriations for the support of public schools, which are excluded from the referendum, not merely any act which tends to support public schools. It evidently contemplates such provisions as appear in the appropriations bills, for the support and operation of the State Teachers' College, the State University, teachers' training schools in certain cities, and inspectors of public schools, the state educational department, which are maintained by direct appropriations of money by the Legislature in their appropriation bills.

"The relator very ingeniously argues that appropriations may be general as well as special; that a general law by the Legislature, which authorizes the county court of a county to pay money for certain purposes, is in a broad sense an appropriation. State ex rel. v. Mason, 153 Mo. loc. cit. 59, 54 S.W. 524. He argues further that, if the emergency provision in the

Mr. John C. Vaughn

Constitution was not given that meaning, the public schools might be closed for lack of such appropriations.

"There is no ground for such apprehension. Whether the county superintendent's salary was determined by one law, or another; whether it was large or small; whether the laws of 1909 or the act of 1919 applied, would make no difference in the operation of the schools in this case, nor can we conceive of a case where it would. Some law is always in force and effect providing for the operation and maintenance of the public schools. It would be a stretch of construction to say that the framers of the referendum clause in the Constitution meant anything else than laws which directly set apart certain sums for certain purposes. If 'appropriations' were used in the broader sense, so as to include laws which authorize the expenditure of money, or laws which fix salaries in connection with public schools and authorize their payment out of county funds, it could have been much more definitely and specifically stated. . . ." [Emphasis supplied] Id. at 1068-1069.

Senate Bill No. 3 may, in the language of the Linville opinion "authorize the expenditure of money" for public schools. However, we do not believe that Senate Bill No. 3 "directly set[s] apart certain sums for certain purposes." Appropriation laws for the support of free public schools for this fiscal year can be found in House Bill No. 2, Seventy-fifth General Assembly. House Bill No. 2 begins with the following: "There is appropriated out of the State Treasury, chargeable to the fund and for the agency and purpose designated . . ." certain specific amounts. No such language of appropriation appears in Senate Bill No. 3. In fact, Senate Bill No. 3 is nothing more than legislative authorization to make a distribution out of the State School Moneys Fund in addition to the three distributions provided for by Section 163.081, RSMo 1967 Supp. Therefore, we conclude that Senate Bill No. 3 is not a law making an appropriation "for the support of public schools."

II.

Based on Senate Bill No. 3 in its entirety, on testimony before the Senate Education Committee and on information furnished by the State Board of Education, we conclude

Mr. John C. Vaughn

that the Missouri Supreme Court
would find that the emergency
clause appended to Senate Bill
No. 3 is valid.

Section 29 of Article III, Missouri Constitution, provides that an act may go into effect before ninety days after adjournment of the session in which it was enacted "in case of an emergency." Section 52(a) of Article III provides that all laws except those ". . . necessary for the immediate preservation of the public peace, health or safety, . . ." shall be subject to referendum at any time within ninety days after adjournment of the legislature. The Missouri Supreme Court has held that these two constitutional provisions must be construed together and that the "emergency" referred to in Section 29 must be such as to make the law ". . . necessary for the immediate preservation of the public peace, health or safety, . . ." State ex rel. Westhues v. Sullivan, 283 Mo. 546, 224 S.W. 327, 334 (Banc 1920).

Furthermore, the Supreme Court in the Sullivan case held that a legislative declaration that the measure is ". . . necessary for the immediate preservation of the public peace, health or safety, . . ." is not conclusive on the judiciary and that the courts may go behind such a legislative declaration to determine whether, as a matter of fact, the legislation is necessary for the immediate preservation of the public peace, health or safety. The court refused to follow a line of cases which made such a legislative finding of emergency conclusive stating:

" . . . To the rule in this line of cases we do not agree. The very substance of a constitutional right could be taken from the people by an overanxious and hostile legislative body. The right here involved is not only constitutional, but one of vital importance and of large proportions. If the courts cannot view the whole measure, and from it determine whether or no the lawmakers overstepped the constitutional restrictions in denying the referendum of the measure by their ukase on the subject of 'immediate preservation of peace, health or safety' then the constitutional referendums become a farce. It becomes a legislative referendum rather than a constitutional referendum, because by a mere false declaration as to 'the peace, health or safety' every measure could be precluded from the constitutional referendum." Id. at 337.

* * *

Mr. John C. Vaughn

"The reason of the thing lies with this rule. By the referendum provision of our Constitution, as we have construed it, supra, no measure subject to the referendum can be withdrawn therefrom by a mere emergency clause. Nor should the people be denied their constitutional right of referendum by a mere declaration of 'immediate preservation of the peace, health or safety' unless such declaration is borne out by the face of the measure itself. The courts have the right to measure the law by the yardstick of the Constitution, and determine whether or not the lawmakers breached the Constitution in making the declaration. . . ." Id. at 338.

The holdings of the Sullivan case were affirmed by the Missouri Supreme Court in the case of State ex rel. City of Charleston v. Holman, 355 S.W.2d 946 (Mo. Banc 1962) in which the court had before it a statute authorizing the issuance of general obligation bonds for industrial development. The court concluded that the act did not constitute an emergency and, therefore, it did not become effective until the expiration of a ninety day period. In reaching this conclusion the court reaffirmed the essential holdings in the Sullivan case:

"In 1920, this court, in construing the purpose and effect of provisions of the Constitution of 1875 from which the above quoted §§ 29 and 52(a), Article III, of our present constitution are taken, held they, of necessity, were to be read and considered together. And so construing them, it was further held that no act subject to the referendum provisions of § 52(a) could go into effect earlier than 90 days after the adjournment of the session at which it was enacted; that neither could an act subject to referendum be made effective at an earlier date by the mere legislative declaration that an earlier effective date was necessary for the immediate preservation of the public peace, health or safety; and that the courts are vested with the right and duty to measure the act 'by the yardstick of the constitution' and determine whether in fact its provisions are 'necessary for the immediate preservation of the public peace, health or safety.' State ex rel. Westhues v. Sullivan, 283 Mo. 546, 224 S.W. 327, 333-339. . . ." Id. at 950-951.

Mr. John C. Vaughn

From the foregoing we conclude that a legislative declaration of emergency does not render an act immediately effective; the courts may determine whether a law is in fact ". . . necessary for the immediate preservation of the public peace, health or safety,"

To be an emergency there need not be an unforeseen combination of circumstances or a sudden or unexpected necessity. The Missouri Supreme Court in State ex rel. Tyler v. Davis, 443 S.W.2d 625 (Mo. Banc 1969) summarized the test for an emergency as follows:

"The test of whether an emergency exists which justifies enactment of emergency legislation is not one of the foreseeability. The circumstance that events asserted to create an emergency were unforeseen may be additional evidence that an emergency exists, but absence of foreseeability is not a sine qua non. Rather, the test is whether the factual situation is such that there is actually a crisis or emergency which requires immediate or quick legislative action for the preservation of the public peace, property, health, safety or morals." [Emphasis supplied] Id. at 631.

The legislative declaration of emergency is entitled to great weight but is not conclusive on the courts:

"Missouri is in accord with the prevalent view that a legislative declaration stating an act to be an emergency measure is entitled to great weight, 'but is not conclusive, because the courts possess the final authority to determine whether an emergency in fact exists.' 16 Am.Jur.2d, Constitutional Law, Section 171, p. 390. See also 37 Am.Jur., Municipal Corporations, Section 152, p. 765; Annotations: Emergency Clause in Ordinance, 35 A.L.R.2d 586, 55 A.L.R. 779. . . ." Padberg v. Roos, 404 S.W.2d 161, 170 (Mo. Banc 1966)

In determining whether there is actually a crisis or emergency which requires immediate legislative action for the preservation of the public peace, health or safety, the courts take into consideration (1) the entire statute under consideration, State ex rel. Westhues v. Sullivan, supra, at 339, (2) facts of which the court can take judicial notice, State ex rel. City of Charleston v. Holman, supra, at 952, (3) the history of the legislation including factual matters brought to the attention of the legislature prior to passage of the

Mr. John C. Vaughn

act, State ex rel. Pollock v. Becker, 289 Mo. 660, 233 S.W. 641, 650 (Banc 1921), and (4) evidence presented to a court justifying the passage of the act as an emergency measure, State ex rel. Tyler v. Davis, supra. Based on facts obtained from these sources, a court then determines whether the legislative decision that an emergency existed was justified and whether an emergency did exist.

Taking into consideration facts which would be obtained from these sources, would a court conclude that Senate Bill No. 3 is responsive to an actual crisis or emergency requiring immediate legislative action for the preservation of the public peace, health or safety? On its face and taken as an entirety, Senate Bill No. 3 authorizes an additional distribution of funds to the public schools of Missouri in two fiscal years -- 1969-70 and 1970-71. Section A of Senate Bill No. 3 states that there is a ". . . serious shortage of funds for the public schools of this state . . ." and concludes that ". . . adequate funding of the public schools is a matter of extreme importance to the people of this state, . . ." These are the legislative findings supporting its conclusion that an emergency exists and should be given great weight.

A court would take judicial notice of the following language of paragraph 7 of Section 163.031, V.A.M.S., Senate Bill Nos. 1, 185 and 215:

" . . . it is hereby provided that the general assembly shall transfer to the state school moneys fund two hundred thirty-four million dollars for fiscal year 1969-1970 less the amount derived from the tax on cigarettes provided for in section 149.020, RSMO; . . ."

That the school districts of the state budgeted their expenditures for the 1969-70 school year (ending June 30, 1970) on receiving their pro rata share of \$234 million is established by a survey conducted by the State Board of Education and referred to in your opinion request as follows:

"In a recent survey completed by the Department of Education it was found that of 499 school districts reporting, which included the largest school districts in the state, 96.38 percent of them had adopted a budget for the present year which would include the anticipated receipt of their proportionate share of the \$234 million. Programs were developed by the school districts to expend the anticipated funds, contracts were let to teachers on this basis, and many tax levies were established on

Mr. John C. Vaughn

the basis of anticipated receipt of their share of the \$234 million. . . ."

Some of the effects on school districts of not receiving the full amount of state aid promised by the legislature are referred to in your opinion request:

". . . 129 districts in the state reported that if they did not receive the full amount of state funds which they anticipated, it would be necessary for them to either borrow money from a bank with a high rate of interest or use funds which they had planned to use in operation, such as buying safety equipment, buses, health services, and other operation expenses. In many instances, funds that would normally be allotted for building maintenance will have to be used for operational expenses, creating serious maintenance problems."

For the purposes of this opinion we are relying on and accepting as correct, these statements from your opinion request. Furthermore, we are relying on the following information furnished to us by Hubert Wheeler, Commissioner of Education, and Delmar Cobble, Deputy Commissioner of Education, concerning the effects on school districts of not receiving the entire \$234 million promised by the legislature in Section 163.031.

On May 21, 1970, 580 questionnaires were sent to school superintendents throughout the state. There were 513 questionnaires returned. The questions asked and the responses given were as follows:

- "1. Was your 1969-70 budget adopted with the understanding that your district would receive its proportionate share of the \$234,000,000 made possible by Senate Bill No. 1? Yes 492 No 20
- "2. If there is no fourth payment of the 1969-70 foundation program apportionment, can your district meet the June payroll without transferring money from the incidental fund or borrowing money from a bank? Yes 290 No 213
- "3. Is it the policy of your district to pay teachers in twelve equal monthly payments? Yes 458 No 50 If so, do you write

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July and August teachers' checks in June?
Yes 369 No 94

- "4. Is it a general procedure in your district to transfer money from the incidental fund to meet salary obligations of the teachers fund? Yes 202 No 308 If so, and if the fourth payment is not received, will the amount of such transfer be greater this year than in previous years? Yes 184 No. 48
- "5. If the fourth payment is not made in June, will it be necessary for your board of education to borrow money from a bank to meet the obligations of the district until the September 1970 payment of state foundation program funds is received? Yes 132 No 366 "

Based on this survey we are advised that if Senate Bill No. 3 is not effective immediately upon approval by the Governor, districts will be making transfers from their Incidental Funds to their Teachers Funds in order to pay their teachers for services already rendered. Furthermore, even for those districts that regularly make transfers from their Incidental Funds to their Teachers Funds, the amount of these transfers would be increased if a fourth payment is not received immediately. We were advised that due to the high cost of money it is likely that districts needing money to pay obligations to teachers over the summer months will transfer money from other sources rather than borrow. The only source most districts have from which to transfer such funds, we are told, would be the Incidental Fund. Money from a school district's Incidental Fund is used to finance a wide range of activities and services. Any balance left in a district's Incidental Fund at the end of school in the spring would be committed in large part to maintenance of all types on school district plant and equipment. Maintenance of plant would include salaries of maintenance people, contracted services, replacement of equipment and upkeep and materials. We were advised that examples of the type of maintenance which a school district would schedule in the summer months are: stairway repairs, repairs and replacement of floor coverings, installation of advance safety equipment such as modern fire and tornado warning systems, boiler inspection and repair, and maintenance of athletic facilities including equipment, bleachers, etc. This is only a small part of the maintenance and repair jobs which schools typically schedule for the summer months and which usually are paid for out of the Incidental Fund. For those districts providing transportation in district-owned school buses, the summer months are the time for

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bus maintenance and replacement. Most significant maintenance services on buses and plant must be performed in the summer because school facilities, including buses, are not in use or are being used on a reduced basis. It was the conclusion of Commissioner Wheeler and Mr. Cobble that in each of the 184 districts which will have to increase their transfers from their Incidental Fund to their Teachers Fund, if the fourth payment is not received immediately, the superintendent and school board will have to evaluate their situation and determine what part of the planned maintenance scheduled for this summer can be completed with the money remaining in the Incidental Fund. In many districts, some or all of the maintenance and repair jobs referred to above would be foregone entirely due to lack of money or postponed until some future date after September 15 and after the school year had begun. The maintenance and repair work important to a district's overall program would be given priority which in many instances might not be the most important from a safety point of view.

The foregoing information furnished by the State Board of Education was similar to testimony before the Senate Education Committee on June 1, 1970. (Similar testimony was given before the House Education Committee but was not recorded). Delmar Cobble, Deputy Commissioner of Education and superintendents from the Poplar Bluff, Bolivar, Kansas City, Sikeston, Dallas County R-I, West Plains, Mountain View, Crawford County R-II, Slater and Marceline School Districts testified in support of Senate Bill No. 3. In response to a question from Senator Gant, Delmar Cobble testified that any district that would have to borrow money from a bank would only do so after having transferred as much as possible out of the Incidental Fund. Mr. Cobble pointed out that "many school districts use 100 percent of the state moneys for the Teachers Fund" instead of just the 80 percent required by law. Any such district desperately needs its full pro rata share of this \$234 million to pay the June, July and August payments on the contracts of teachers who have already rendered their services. The money to make these payments, if not in the Teachers Fund because a district's full pro rata share of state moneys was not received, must be obtained from other sources. Mr. Cobble testified that any deficit in the Teachers Fund would be made up by transferring funds from the Incidental Fund of the district.

Furthermore, Mr. Cobble testified that many school districts are approaching the summer months with smaller balances than ever before because of the delay in receiving a portion of local tax revenues caused by Senate Bill No. 39 which permitted taxes to be paid under protest. The effect of this has been to delay the receipt of local tax revenues for many districts. Although this would be a small percentage of a district's total receipts, Mr. Cobble pointed

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out that for the many districts in the state which are "in dire circumstances" this small percentage is crucial. Mr. Cobble also called the Committee's attention to the fact that school districts receive very little money from taxes between March 15 and September 15. Therefore, they must operate from March through mid-September on receipts from local sources and on the March 15 distribution of state moneys.

Mr. Cobble emphasized the safety factor involved in districts having to use incidental funds for the payment of teachers' salaries, thereby denying districts the opportunity "to purchase needed bus equipment and other needed safety equipment, and any other safety equipment that they may be using in the school." Mr. Cobble also referred to the adverse effect a delayed fourth payment would have on summer programs in many school districts through the state. (Since this testimony before the Senate Education Committee, a telephone survey of 256 of the 697 school districts in the state was made inquiring about the effect of a delayed fourth payment on summer programs. Forty-four districts responded that the failure to receive their full pro rata share of \$234 million would or, in some cases, already had necessitated the curtailment or elimination of summer school programs. We are advised that approximately 100,000 children are or would be affected by this curtailment or elimination of summer programs if the fourth payment is not made immediately).

Testimony from school superintendents confirmed the conclusions drawn by Mr. Cobble from the survey conducted by the State Board of Education. The necessity of transferring money from the Incidental Fund to the Teachers Fund to pay teachers for services already rendered under their 1969-70 contracts was emphasized. One superintendent pointed out that although his district was able to meet the salaries of teachers under contract, it appeared as if salaries of some non-certificated personnel over the summer could not be met if a fourth distribution was not made in June. Particularly, layoffs would have to come in the district's summer maintenance force.

Relying on the foregoing facts and conclusions pertaining to the financial condition of many school districts in the State of Missouri and, particularly, on the detrimental effect on scheduled maintenance and repairs which the delayed fourth distribution of funds from the State School Moneys Fund would have, we believe that, if this matter were presented to the Missouri Supreme Court, it would conclude that a fourth payment from the State School Moneys Fund is necessary for the "immediate preservation of the public peace, health or safety."

CONCLUSION

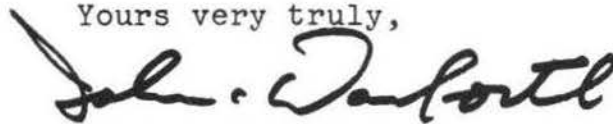
Therefore, it is the conclusion of this office that Section A of Senate Bill No. 3, Third Extraordinary Session, 75th General

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Assembly, qualifies under Sections 29 and 52(a) of Article III of the Missouri Constitution as a valid emergency clause and that Senate Bill No. 3 will become effective upon approval by the Governor.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, D. Brook Bartlett.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is written in a cursive style with a large, sweeping initial "J".

JOHN C. DANFORTH
Attorney General

TAXATION (INCOME): (1) A corporation whose only activity
TAXATION (EXEMPTIONS): is the investment or reinvestment of its
own funds in securities which are obligations of the United States Government or its instrumentalities is not subject to Missouri Income Tax by reason of the provisions of Section 143.040.1, RSMo 1969, and the income thereof is exempt under Section 143.150(5), RSMo 1969. (2) Dividends paid to stockholders of the corporation described in (1) are to be included in taxable income under the provisions of Section 143.100, RSMo 1969.

October 28, 1970

OPINION NO. 389

Honorable Philip H. Snowden
Representative - District 86
313 Armour Road
North Kansas City, Missouri 64116



Dear Representative Snowden:

This official opinion is rendered pursuant to the request contained in your letter concerning the taxation of an open-end diversified investment company and its stockholders under the Missouri Income Tax Law.

More specifically the questions presented are (1) whether a regulated investment company as defined in the Internal Revenue Code is exempt from the Missouri Income Tax by reason of Section 143.040, RSMo 1969, and, (2) whether dividends paid to the stockholders of a regulated investment company from undistributed profits or earnings, the source of which is interest on obligations of the United States, are taxable under the Missouri Income Tax Law.

The pertinent facts as set forth in the request and the prospectus filed with the Securities and Exchange Commission are as follows:

Mutual Fund for Investing in U. S. Government Securities, Inc., was incorporated under the laws of the State of Maryland in 1969. It maintains its principal office in Pittsburgh, Pennsylvania. Certain of the shares of the corporation are owned by residents of Missouri and while it is not clear whether the corporation is doing business in Missouri, such fact is assumed for the purpose of this opinion.

The primary purpose or objective of the Fund is to receive current income from its investments and its investments are limited to

Honorable Philip H. Snowden

securities which are obligations of the United States Government or its instrumentalities. The Fund was organized and is being operated in such manner as to meet the requirements of the Internal Revenue Code applicable to regulated investment companies and thereby to receive the special federal income tax treatment afforded to such companies. The corporation distributes its earnings or profits to its shareholders by declaration and payment of dividends.

A regulated investment company, as defined in Section 851(a) of the Internal Revenue Code of 1954 and the Investment Company Act of 1940, as amended, 54 Stat.789 (1940); 15 U.S.C. 80a-1 to 80b-2 (1940) is an issuer of any security and which is engaged or proposes to engage in the business of investing, reinvesting, owning, holding, or trading in securities.

While it is recognized that the federal statutes do not control the taxation of such corporations under the state law, the statutes of Missouri contain a provision which excludes from the income tax corporations whose activities are of the type involved in the present case.

Section 143.040.1, RSMo 1969, in pertinent part provides as follows:

" * * * a tax shall be levied upon, assessed against, collected from, and paid by every corporation, * * * licensed to do business in this state, or doing business in this state, * * * except corporations whose only activity is the investment or reinvestment of its own funds in stocks, bonds, any other securities, * * * in such percent, as now or hereafter provided, of the net income from all sources in this state during the preceding year. * * * "

Section 143.030.2, RSMo 1969, states:

"The rate of two percent of net income is hereby declared and provided as the rate or percent of net income levied and assessed by, and as applicable to sections 143.040 to 143.080."

The express provisions of the statute made an exception of corporations whose activities are of the same character as those of the regulated investment company involved here.

In addition to the exception provided in Section 143.040, the income received by this corporation would not be subject to Missouri income tax by reason of Section 143.150, RSMo 1969, which provides:

"The following income shall be exempt from the provisions of this chapter:

Honorable Philip H. Snowden

*

*

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"(5) Interest upon the obligations of this state or any political subdivision thereof, or upon the obligations of the United States or its possessions."

Based upon the language of the statute, therefore, it is our view that the corporation here in question is not subject to the income tax imposed by the State of Missouri.

The second question raised by your letter relates to the taxable character of dividends received by stockholders of the corporation considering the fact that the entire source of corporate income is yield from United States Government obligations.

As indicated above, Section 143.150 exempts from the income tax "Interest * * * upon the obligations of the United States * * * ". In the present case the interest income is paid by the United States Government to the corporation and when paid it becomes a part of the current earnings or undistributed profits of the corporation although because of the exemption such interest would not be included in taxable net income. The earnings or profits of the corporation are the source from which dividends are paid to the stockholders. There is no payment of interest by the United States Government to the stockholders. There is a distribution of earnings or profits of the corporation to the stockholders by way of dividend payments. It is the interest paid by the United States Government to the corporation which carries the tax exemption; there is no exemption of amounts received by stockholders from earnings or profits of the corporation.

Under both the federal statutes and the Missouri law, dividends paid from earnings or profits of a corporation are taxable to the shareholder. Section 143.100.2, RSMo 1969, defining income subject to tax, in pertinent part, states as follows:

"2. 'Income' shall also include interest, rent, dividends, securities and gains, profits and earnings from any other transactions of any business carried on for gain or profit; and from any sources whatever; * * * "

The only basis for holding the dividends received to be exempt from tax is to assume that the United States Government bond interest constituted income of the stockholders rather than the corporation. In other words, the corporation is a mere conduit through which such interest passed from the government to the stockholders. We do not believe the conduit principle is properly applied to the factual situation involved here.

It has been authoritatively stated that in general, income exempt from tax received by a corporation loses its character as such and becomes part of the earnings and profits of the corporation taxable as a dividend upon distribution to the stockholders. It is immaterial

Honorable Philip H. Snowden

that a separate account is being kept of such income or even that it is placed in a separate bank account. This rule is of particular importance in the case of tax exempt interest. This interest, although exempt from income tax when received by the corporation, nevertheless forms part of its earnings and profits and hence a source of taxable dividends. Law of Federal Income Taxation, Mertens, Vol. 1, Sec.9.32; Ayer v. Commissioner, 12 B.T.A.284; Wilson v. Commissioner, 31 B.T.A. 1022; Weyerhaeuser v. Commissioner, 33 B.T.A. 594; United National Corporation 2 T.C.111.

In the Weyerhaeuser case, supra, it was said:

" * * * Again, many items, such as interest upon the obligations of a state or political subdivision, tax-free federal securities, and dividends from other corporations, must necessarily be considered in computing earnings and profits, though forming no part of taxable net income."

Likewise in Ayer v. Commissioner, supra, the Board of Tax Appeals said:

"This is not the only case where some income or profit free from tax in the hands of a corporation is, nevertheless, taxable to a stockholder upon distribution. Dividends and stock of domestic corporations, interest on bonds and obligations of states and municipalities, and statutory exemptions are not a part of the statutory net income of a corporation, but are nevertheless a part of its earnings or profits and may form a part of ordinary dividends which are taxable when received by the stockholders. * * * "

In United National Corporation, 2 T.C.111,123, the court said:

"The tax free profit realized upon the redemption of the preferred stock is taxable to a stockholder upon distribution, just as tax free interest on exempt bonds is part of earnings and profits and may form part of ordinary dividends which are taxable when received by stockholders. * * * "

Although these cases arose under federal income tax statutes, it is apparent the same principle is applicable under the Missouri law. The concept of dividends under the Missouri statute is sufficiently broad to include any distribution from earnings or profits.

It is our further opinion that the fact the corporation here is a regulated investment company under the federal law rather than an ordinary business corporation does not change the character of its distributions to stockholders. In this connection, the author, Lester W. Rubin, in an article entitled "Regulated Investment Companies," (8 Taxes 541) stated:

Honorable Philip H. Snowden

"It is very seldom that regulated investment companies put their funds into tax-exempt state and municipal obligations. The rate of return is too low. But if interest were received from tax-exempt securities and were then paid out in the form of dividends, would these dividends be tax-exempt to the investment company shareholders? No specific authority seems to be available, at present, on this point, but qualified authorities in the investment company field who were consulted were of the opinion that no earmarking of dividends as tax exempt would be possible. If the company had a surplus, the dividends would be taxable, but if there were a deficit, the dividends would be a tax-free return of capital. According to this view, the 'conduit' principle does not apply."

We recognize there is little authority on the precise point. However, it is our opinion that the principle set forth in Mertens Law of Federal Income Taxation as supported by the cases cited therein, is properly applicable to the circumstances involved here.

CONCLUSION

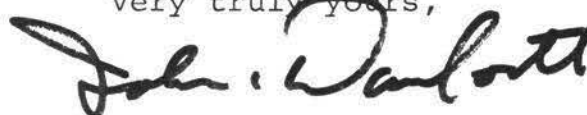
It is, therefore, the opinion of this office that:

(1) A corporation whose only activity is the investment or reinvestment of its own funds in securities which are obligations of the United States Government or its instrumentalities is not subject to Missouri Income Tax by reason of the provisions of Section 143.040.1, RSMo 1969, and the income thereof is exempt under Section 143.150(5), RSMo 1969.

(2) Dividends paid to stockholders of the corporation described in (1) are to be included in taxable income under the provisions of Section 143.100, RSMo 1969.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John E. Park.

Very truly yours,



JOHN C. DANFORTH
Attorney General

September 28, 1970

OPINION LETTER NO. 390

Answer by letter, Voigts

Honorable Vic Downing
Representative, District 160
Rural Route No. 1
Bragg City, Missouri 63827



Dear Representative Downing:

This is in response to your request for the opinion of this office as to the existence of any constitutional infirmities with respect to House Bill No. 551, 75th General Assembly. We are advised this bill passed the House, however, it died on the Senate calendar. You state the present inquiry is motivated by your intention to introduce the bill at the next General Assembly. House Bill No. 551, 75th General Assembly, would repeal Sections 482.010, RSMo 1959, and 481.200 and 482.150, RSMo Supp. 1967, relating to magistrates and to enact in lieu thereof three new sections relating to the same subject.

One of the changes which would be effected is set forth in the proposed bill as Section 482.010(2), which provides:

"2. In counties of (thirty) (forty-five) forty-two thousand inhabitants or less the probate judge shall be the judge of the magistrate court. In counties of more than (thirty) (forty-five) forty-two thousand and not more than seventy thousand inhabitants there shall be one magistrate. . . ."

The proposed bill is in conflict with the provisions of Article V, Section 18, Constitution of Missouri, 1945, which provides, as follows:

"There shall be a magistrate court in each county. In counties of 30,000 inhabitants

Honorable Vic Downing

or less, the probate judge shall be judge of the magistrate court. In counties of more than 30,000 and not more than 70,000 inhabitants, there shall be one magistrate. In counties of more than 70,000 and less than 100,000 inhabitants there shall be two magistrates. In counties of 100,000 inhabitants or more there shall be two magistrates, and one additional magistrate for each additional 100,000 inhabitants, or major fraction thereof. According to the needs of justice the foregoing number of magistrates in any county may be increased by not more than two, or such increased number may be decreased, by order of the circuit court on petition, and after hearing on not less than thirty days public notice. The salaries of magistrates shall be paid from the source or sources prescribed by law."

Therefore, because the proposed bill is not a supplement to the constitutional provision but, rather, attempts to modify such constitutional provision, the proposed bill, if enacted, would be unconstitutional. State ex rel. Randolph County v. Walden, 206 S.W.2d 979 (Mo. banc 1947). The change which you seek to effect can be accomplished only by constitutional amendment.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Answer by Letter (J.C. Klaffenbach)

July 27, 1970

OPINION LETTER NO. 393

Honorable Frank Conley
Prosecuting Attorney
Boone County Court House
Columbia, Missouri 65201



Dear Mr. Conley:

This opinion is in response to your question which concerns an interpretation of Section 64.560 RSMo 1969 which states as follows:

"That nothing herein shall affect the recovery of natural resources by strip or open cut mining; provided that commercial structures shall be permitted in all districts except those zoned for residential or recreational use."
(Emphasis added).

Specifically you inquire whether the underlined portion of the above section means that commercial structures can be erected without planning and zoning approval in areas except those zoned for residential or recreational use in counties adopting county planning and zoning under the provisions of Sections 64.510 through 64.690 RSMo 1969.

We note that the bill as introduced did not contain the underscored provision, but that such provision was contained in the bill as truly agreed to and finally passed. There is obviously no relationship between the first part of the paragraph and the underscored provision.

In our view, the legislature intended that commercial structures must be permitted in all districts except those zoned for

Honorable Frank Conley

residential or recreational use, but did not intend that the County Court be divested of any of the broad powers given it pursuant to Sections 64.620, RSMo. et. seq.

Within the framework of the powers vested in the County Courts, they may regulate commercial structures, but do not have the authority to prohibit commercial structures except in residential or recreational districts.

Therefore, in answer to your question, we conclude that under Section 64.560 RSMo 1969, the County Court does not have the authority to prohibit the erection of commercial structures in districts other than those zoned for residential or recreational use. However, commercial structures in such other districts may be regulated as may be consistent with the zoning powers given the County Court.

Very truly yours,

JOHN C. DANFORTH
Attorney General

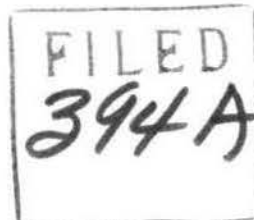
SCHOOLS:

Pursuant to Section 160.051, RSMo 1969, any child whose sixth birthday is before the first day of October after the first day of a school term shall be deemed to be six years of age for the purpose of determining eligibility for admission to school. A rule of a school board which prevents any child whose sixth birthday occurs before October first from attending school is unauthorized, invalid and void. A school board may use reasonable discretion in selecting the date which it will use to determine the age eligibility of children for the district's program of gratuitous education of children between five and six years of age. A school board may decide upon an age determination date which would permit children who are less than five years of age on the first day of the school term to enroll in such classes. However, only those children who have reached the age of five prior to October first after the first day of the school term may be counted in determining "average daily attendance" for state aid purposes.

OPINION NO. 394 A

September 25, 1970

Honorable William F. Moore
State Representative
District No. 3
4320 Bell
Kansas City, Missouri 64111



Dear Representative Moore:

This official opinion is issued in response to your request for a ruling on the following question:

"I would like to request an opinion on Chapter 160.051 relating to whether enrollment also applies to this section of chapter. Does the October 1st date apply to enrollment, if a child is six years old before October 1st or in the case of kindergarten being available, five years old before October 1st or can the respective school boards arbitrarily set other dates for enrollment as it relates to age qualification?"

Honorable William F. Moore

Section 160.051, RSMo 1969, provides:

"A system of free public schools is established throughout the state for the gratuitous instruction of persons between the ages of six and twenty years. Any child whose sixth birthday occurs before the first day of October after the first day of a school term shall be deemed to have attained the age of six years at the commencement of the term for the purpose of apportioning state school funds and for all other purposes. Gratuitous instruction for persons between the ages of five and six years may be provided by the board of education."

This section entitles persons between the ages of six and twenty years to receive a public school education; it also allows the board of education, at its discretion, to provide for gratuitous instruction for persons between the ages of five and six years.

The legislature, having directly granted this basic power to educate, may from time to time limit and modify this power. However, except as limited by statute, the legislature has granted to each school board the general authority to make all needful rules and regulations for the operation of the schools in its district. This authority is granted by Section 171.011, RSMo 1969:

"The school board of each school district in the state may make all needful rules and regulations for the organization, grading and government in the school district. . . ."

As previously noted, a statutory provision cannot be altered or changed by a rule or regulation of a school board.

Section 160.051 specifically states that:

". . . Any child whose sixth birthday occurs before the first day of October after the first day of a school term shall be deemed to have attained the age of six years at the commencement of the term for the purpose of apportioning state school funds and for all other purposes. . . ." (Emphasis added)

This section prescribes October first as the date school boards must use as the cut-off date in determining which children are six years of age. Therefore, any rule of a school board prohibiting a child

Honorable William F. Moore

whose sixth birthday occurs before October first from attending school is unauthorized, invalid and void.

Section 160.051 concludes as follows:

" . . . Gratuitous instruction for persons between the ages of five and six years may be provided by the board of education."

In the case of Edwards v. St. Louis County, 429 S.W.2d 718, (1968), the Supreme Court of Missouri after discussing various rules of statutory construction said loc. cit. 722:

"In all these diverse and sometimes conflicting rules the ultimate guide is the intent of the legislature; the other rules of construction may be considered merely as aids in reaching that result; and the purpose and object of the legislation should not be lost sight of." (Emphasis added)

It is necessary, therefore, to determine whether the legislature intended by the last sentence of Section 160.051 to restrict a board of education's power to educate gratuitously in kindergarten only children who have actually attained five years of age or whether the legislature intended that a school board could deem some children to be five years old for the purposes of attending a kindergarten program.

Section 163.011, RSMo 1969, applicable to state aid for schools, provides in part as follows:

"(1) 'Average daily attendance' means the result obtained by dividing the total number of days attended of resident pupils in grades kindergarten through twelve, inclusive, and between the ages of five and twenty, by the actual number of days that the school was in session not including legal school holidays and legally authorized teachers' meetings; . . ."

Section 163.017, RSMo 1969, provides as follows:

"For the purpose of determining state aid payments under sections 163.031 and 163.033, on kindergarten attendance, 'average daily

Honorable William F. Moore

attendance' shall be obtained by dividing one-half the total number of days attended by resident kindergarten pupils whose fifth birthday occurs before the first day of October after the first day of the school term, by the actual number of days that the school was in session not including legal school holidays and legally authorized teachers' meetings."

Under the provisions of Sections 163.011 and 163.017, the legislature has made a statutory determination that kindergarten pupils who attain the age of five before October first after the first day of the school term are five years of age for purposes of state aid during the entire school year. Section 163.017 indicates that the legislature contemplated that there might be children attending kindergarten who were not actually five on the day the term began.

Therefore, we believe that a school district has the power to admit kindergarten pupils who are not five years old when the school term begins. Section 163.017 does not require that October first be used "for all other purposes" as is provided in Section 160.051 with reference to the determination of who is six years old. Therefore, pursuant to a school board's general power to make all needful rules and regulations for the organization and government in its district (See Section 171.011), the school board may select an age determination date for kindergarten enrollment purposes other than October first. However, we caution that only those children who have reached the age of five prior to October first after the first day of the school term may be counted in determining "average daily attendance" for state aid purposes.

The opinion of August 19, 1970, which held that a school board could provide gratuitous instruction only to children who reached the age of five prior to the commencement of instruction is hereby withdrawn.

CONCLUSION


It is the opinion of this office that pursuant to Section 160.051, RSMo 1969, any child whose sixth birthday is before the first day of October after the first day of a school term shall be deemed to be six years of age for the purpose of determining eligibility for admission to school. A rule of a school board which prevents any child whose sixth birthday occurs before October first from attending school is unauthorized, invalid and void.

Honorable William F. Moore

It is further the opinion of this office that a school board may use reasonable discretion in selecting the date which it will use to determine the age eligibility of children for the district's program of gratuitous education of children between five and six years of age. A school board may decide upon an age determination date which would permit children who are less than five years of age on the first day of the school term to enroll in such classes. However, only those children who have reached the age of five prior to October 1 after the first day of the school term may be counted in determining "average daily attendance" for state aid purposes.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, D. Brook Bartlett.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and "D".

JOHN C. DANFORTH
Attorney General

Answer by Letter (Klaffenbach)

July 9, 1970

OPINION LETTER NO. 399



Honorable Earl L. Schlef
State Representative
28th District
1672 Maldon Lane
Dellwood, Missouri 63136

Dear Representative Schlef:

This letter is in response to your question concerning the powers of an elected marshal of a fourth class city with respect to the hiring and firing of police personnel and also the question of whether the board of aldermen of a fourth class city may create a police commission for the purpose of overseeing the operations of the police department.

Section 85.620, RSMo 1959, with regard to fourth class cities, states in full:

"The police of the city may be appointed in such numbers, for such times and in such manner as may be prescribed by ordinance. They shall have power to serve and execute all warrants, subpoenas, writs or other process, and to make arrests in the same manner as the marshal. The marshal and policemen shall be conservators of the peace, and shall be active and vigilant in the preservation of good order within the city."

It is clear from the above statute that the manner of appointment of the members of the police force as well as the number of such members is governed by ordinance.

Honorable Earl L. Schlef

The board of aldermen has the power to fix the compensation of all officers and employees of the city by ordinance, Section 79.270, RSMo 1959; and, the board may pass ordinances regulating the manner of removals, Section 79.240, RSMo 1959.

In our Opinion No. 205, dated July 22, 1964, to O'Brien, and similarly in our Opinion No. 299, dated August 31, 1964, to O'Brien, we considered the question of the appointment of a board of police commissioners to supervise the operation of the police department and concluded that the marshal is the chief law enforcement officer of the city and the board of aldermen has no authority to appoint a board of police commissioners to take over the functions of the marshal who is also the chief of police.

We have enclosed copies of the cited opinions.

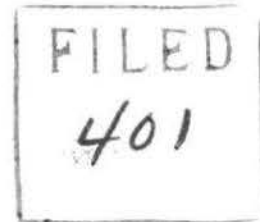
Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 205,
7-22-64, O'Brien

Op. No. 299,
8-31-64, O'Brien

June 30, 1970



The Honorable R. J. King, Jr.
State Representative
District 39
816 South Hanley Road
Clayton, Missouri 63105

Dear Representative King:

This letter is in response to your request for opinion which is stated as follows:

"In view of the definition of the word 'community' as contained in Section 99.320--Definitions, subsection 6, R.S.Mo 1959, does a constitutional charter city having less than 75,000 population have to submit the proposition of accepting the provisions of the Land Clearance For Redevelopment Authority Law to the qualified voters at an election as provided by law for the incurring of an indebtedness and having a majority voting at the election in favor of such a proposition; or can the Council of any constitutional charter city enact ordinances providing for the clearance, replanning, etc. as provided in Article 6, Section 21 of the Constitution without the necessity of a vote thereon as required by statute."

We further understand that your question does not ask whether such a constitutional charter city can come under the provisions of the Land Clearance For Redevelopment Law without approval by the voters, but whether the legislature has restricted the authority of such a city to enact proper ordinances on the subject.

The Honorable R. J. King, Jr.

Section 99.300 RSMo et seq., relates to the Land Clearance For Redevelopment Authority Law. Section 99.320 RSMo Supp 1967 contains a definition defining "community" as follows:

"(6) 'Community', any county or municipality, except that such term shall not include any municipality containing less than seventy-five thousand inhabitants until the governing body thereof shall have submitted the proposition of accepting the provisions of this law to the qualified voters therein at an election called and held as provided by law for the incurring of indebtedness by such municipality, and a majority of the voters voting at the election shall have voted in favor of such proposition;"

Section 21, Article VI of the Missouri Constitution provides:

"§ 21. Reclamation of blighted, substandard or insanitary areas

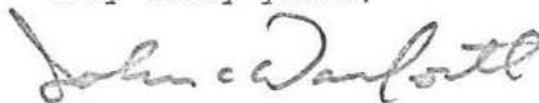
Section 21. Laws may be enacted, and any city or county operating under a constitutional charter may enact ordinances, providing for the clearance, replanning, reconstruction, redevelopment and rehabilitation of blighted, substandard or insanitary areas, and for recreational and other facilities incidental or appurtenant thereto, and for taking or permitting the taking, by eminent domain, of property for such purposes, and when so taken the fee simple title to the property shall vest in the owner, who may sell or otherwise dispose of the property subject to such restrictions as may be deemed in the public interest."

In our view it is clear that the above constitutional provision expressly provides that a constitutional charter city may enact ordinances for the purposes therein provided and that this provision is self-enforcing and requires no implementation by the legislature. Likewise, the provisions of the Land Clearance For

The Honorable R. J. King, Jr.

Redevelopment Authority Law do not restrict the authority of such a city to enact such ordinances.

Very truly yours,

A handwritten signature in cursive script, reading "John C. Danforth". The signature is written in dark ink and is positioned above the printed name and title.

JOHN C. DANFORTH
Attorney General

CORPORATIONS:
CONSTITUTIONAL LAW:

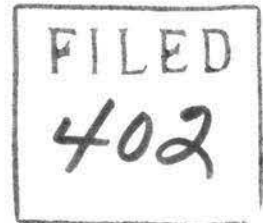
Article XI, Section 7 of the Constitution of Missouri and Section 351.160, RSMo 1969, do not render

void bonds which are sold at less than par or face value where the bonds are issued to promote the legitimate business of the corporation and the discount price is arrived at after bona fide arms length negotiations between the corporation and the purchaser and is the best price that the corporation in good faith could obtain.

OPINION NO. 402

September 25, 1970

Honorable William C. Phelps
State Representative
District No. 4
5016 Grand
Kansas City, Missouri 64112



Dear Representative Phelps:

This is to acknowledge receipt of your request for an opinion from this office which reads in part as follows:

"A Missouri corporation proposes to issue and sell its bonds to a purchaser or purchasers for cash at a price and interest rate to be determined by negotiation. It is believed that the purchasers will offer to buy the bonds at a discount price which is below the par or face value of the bonds. If the bonds are sold at such a discount, the interest rate will be lower than if the bonds are sold at par. It also should be taken as a fact that if the bonds are sold at par or face value a higher interest rate would be demanded by the purchaser or purchasers.

"The sale of the bonds at less than par or face value will mean that the corporation will receive in cash less than 100% of the par or face value of the bonds. The corporation will receive no other consideration for the bonds. It should be assumed that the issuance of the bonds will promote the legitimate business of the corporation, that the discount price was arrived at after bona fide arms length negotiations between the corporation and the purchaser or purchasers and was the best price that the corporation in good faith could obtain.

Honorable William C. Phelps

"Your opinion is requested with respect to the effect of Section 7, Article 11 of the 1945 Constitution of Missouri and Section 351.160. R. S. Mo., as it applies to a sale of the bonds at a discount which will result in the corporation receiving less than the par or face value of the bonds."

Article XI, Section 7 of the Constitution of Missouri provides as follows:

"No corporation shall issue stock, or bonds or other obligations for the payment of money, except for money paid, labor done or property actually received; and all fictitious issues or increases of stock or indebtedness shall be void; provided, that no such issue or increase made for valid bona fide antecedent debts shall be deemed fictitious or void. The stock or bonded indebtedness of corporations shall not be increased nor shall preferred stock be issued, except according to general law."

Section 351.160, RSMo 1969, provides as follows:

"1. No corporation shall issue shares, or bonds or other obligations for the payment of money, except for money paid, labor done or property actually received; and all fictitious issues or increases of shares or indebtedness shall be void; provided, that no such issue or increase made for valid bona fide antecedent debts shall be deemed fictitious or void.

"2. Bonded indebtedness of a corporation shall be incurred or increased only upon prior approval by the board of directors. Unless the articles of incorporation otherwise provide, no vote or consent of shareholders shall be necessary to authorize or approve the incurrence of or an increase in bonded indebtedness."

In construing the meaning of the above provisions, we refer to Memphis & L.R.R. Co. v. Dow, 120 U.S. 287, 7 S.Ct. 482, 30 L.Ed. 595 (1886), where the Supreme Court of the United States construed an identical provision from the Constitution of Arkansas. There the court explained the purpose of the restriction as follows:

Honorable William C. Phelps

" . . . The prohibition against the issuing of stock or bonds, except for money or property actually received or labor done, and against the fictitious increase of stock or indebtedness, was intended to protect stockholders against spoliation, and to guard the public against securities that were absolutely worthless. One of the mischiefs sought to be remedied is the flooding of the market with stock and bonds that do not represent anything whatever of substantial value. . . ." (Id. at 298)

The court then borrowed the following language from the Supreme Court of Illinois which had construed a similar provision from the Constitution of Illinois in Peoria & S.R.R. Co. v. Thompson, 103 Ill. 187 (1882):

" . . . ' . . . The object was, doubtless, to prevent reckless and unscrupulous speculators, under the guise or pretense of building a railroad or of accomplishing some other legitimate corporate purpose, from fraudulently issuing and putting upon the market bonds or stocks that do not and are not intended to represent money or property of any kind, either in possession or expectancy, the stock or bonds in such case being entirely fictitious. . . . '

" 'Under this provision of the constitution, railroad companies have no right to lend, give away, or sell on credit, their bonds or stock, nor have they the right to dispose of either, except for a present consideration, and for a corporate purpose.' " (Id. at 298-299)

Finally, the Supreme Court of the United States concluded that the validity of the bonds does not necessarily require the corporation to receive an amount in money equal to the par value of the bonds:

"Recurring to the language employed in the Arkansas constitution, we are of opinion that it does not necessarily indicate a purpose to make the validity of every issue of stock or bonds by a private corporation depend upon the inquiry whether the money, property, or labor actually received therefor was of equal value in the market with the stock or bonds so issued. It is not clear, from the words used,

Honorable William C. Phelps

that the framers of that instrument intended to restrict private corporations--at least when acting with the approval of their stockholders--in the exchange of their stock or bonds for money, property, or labor, upon such terms as they deem proper, provided, always, the transaction is a real one, based upon a present consideration, and having reference to legitimate corporate purposes, and is not a mere device to evade the law and accomplish that which is forbidden. . . ." (Id. at 299)

An identical provision in the Constitution of Texas was construed in Smith v. Ideal Laundry Co., 286 S.W. 285 (Tex.Cir.App. 1926). The court held that the provision did not require that bonds shall be sold at par or that the corporation shall receive face value for them. Relying on Memphis & L.R.R. Co. v. Dow, the court held as follows:

"The provision of the Constitution under consideration would not justify an inquiry as to whether a corporation received full value for its bonds, nor to inquire into whether too much was paid for property; the only matter for inquiry being as to whether the amount received in money or in property bears a reasonable approximation to the amount of the bonds. . . ." (Id. at 286)

Therefore, where the bonds are issued to promote the legitimate business of the corporation and the best price that the corporation in good faith could obtain is a price less than the par value of the bonds, the bonds are not rendered void by Article XI, Section 7 of the Constitution of Missouri or Section 351.160, RSMo 1969, for the reason that such a provision is intended ". . . to guard the public against securities that were absolutely worthless. . . ." not to ". . . make the validity of every issue of stock or bonds by a private corporation depend upon the inquiry whether the money, property or labor actually received therefor was of equal value in the market with the stock or bonds so issued. . . ." The measure, then, is not whether the par value of the bonds was received by the corporation but ". . . whether the amount received in money or in property bears a reasonable approximation to the amount of the bonds. . . ."

CONCLUSION

Article XI, Section 7 of the Constitution of Missouri and Section 351.160, RSMo 1969, do not render void bonds which are sold

Honorable William C. Phelps

at less than par or face value where the bonds are issued to promote the legitimate business of the corporation and the discount price is arrived at after bona fide arms length negotiations between the corporation and the purchaser and is the best price that the corporation in good faith could obtain.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, B. J. Jones.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

JOHN C. DANFORTH
Attorney General

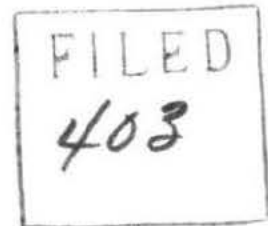
STATE BOARD OF EDUCATION: Review and certification of application
ELEMENTARY & SECONDARY of the State Board of Education for
EDUCATION ACT OF 1965: Grant under Title V of the Elementary
FEDERAL-STATE AGREEMENTS: and Secondary Education Act of 1965,
P.L. 89-10, as amended.

June 24, 1970

OPINION LETTER NO. 403

Answer by Bartlett

Mr. Hubert Wheeler
Commissioner of Education
State Board of Education
Jefferson State Office Building
Jefferson City, Missouri 65101



Dear Mr. Wheeler:

This is in answer to your request for our review and certification of the State Board of Education's Application for Grant to Strengthen a State Department of Education under the Elementary and Secondary Education Act of 1965, Title V, Section 503, P.L. 89-10, for fiscal year 1971.

It is the opinion of this office that the Missouri State Board of Education is the agency in this State primarily responsible for state supervision of public elementary and secondary schools, and, is the "state educational agency" as defined in Section 801(k) of Title VIII of Public Law 89-10 as amended; and that the State Board of Education has the authority under State law to submit an application for a grant pursuant to Section 503 of Title V, Public Law 89-10. See Section 161.092, RSMo 1967 Supp.

In conjunction with this letter opinion which constitutes our official certification of the application, we have completed the required certification form.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Answer by letter-Romines

July 31, 1970

OPINION LETTER NO. 405

Honorable Hardin C. Cox
State Representative
District No. 78
605 Buff Street
Rock Port, Missouri 64482



Dear Representative Cox:

This is in reply to your request for an opinion of this office in which you ask:

"I would like an opinion on whether or not a farm truck or pickup is required by law to have his name on the truck if he is not a commercial operator.

* * *

". . . if he is required to are there any specifications as to position on the truck and size of the lettering."

Section 301.330, RSMo 1969, reads as follows:

"All commercial motor vehicles shall display in a conspicuous place:

"(1) The name of the owner;

"(2) The address from which such motor vehicle is operated or the number issued to a motor carrier by the public service commission;

"(3) The gross weight for which said vehicle is licensed;

Honorable Hardin C. Cox

"(4) Local commercial vehicle in addition shall display in a conspicuous place the word 'local'."

In construing the term "commercial vehicle" the Springfield Court of Appeals in State v. Lasswell (Mo.App.) 311 S.W.2d 356, found a half-ton pickup truck commonly used by farmers, to be within the contemplation of the definition of commercial motor vehicle.

This office has by Opinion No. 62, Mills, 8-24-44, held that a farmer operating a commercial motor vehicle must display his name and address and gross weight on the vehicle, and a designation as to whether it is local.

You further inquire as to whether there are any specifications in the law as to the position on the truck which a person's name must be placed and any requirement as to the size of the lettering required. By reference to Section 301.330, RSMo 1969, it may be seen that that section requires, (1) that the name of the owner, (2) the address from which the motor vehicle is operated or the number issued to it as a motor carrier by the Public Service Commission, (3) the gross weight for which said vehicle is licensed, (4) and whether the vehicle is a local vehicle, must be displayed in a conspicuous place on all commercial motor vehicles. As can be seen, however, no specific position on the commercial motor vehicle, is set out as appropriate for the displaying of the information required by Section 301.330. Likewise, neither is there a specification as to the size of the lettering that is required for the setting out of the information required by Section 301.330, supra. It would appear that the legislative intent is that if the information required by Section 301.330, supra, appears on a commercial motor vehicle in a place easily viewable by a peace officer it is conspicuously displayed and as such meets the requirements of Section 301.330.

The owner of a farm truck or pickup which is designed or regularly used to carry freight or more than eight persons is required by law to have his name displayed on his truck in a conspicuous place. It is the further conclusion of this office that the owner of a farm truck or pickup is not required to display the information required by Section 301.330, RSMo 1969, in any particular position on his truck, nor does the law designate a specific size of lettering for the information required by Section 301.330, supra.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 62
8-24-44, Mills

September 30, 1970

OPINION LETTER NO. 406

(Answered by letter-Nowotny)

Honorable Jack K. Smith
Executive Secretary
Missouri Water Pollution Board
112 West High Street
Jefferson City, Missouri 65101



Dear Mr. Smith:

This is in response to your request which asks:

"I wish to inquire as to whether or not the Missouri Water Pollution Board shall require that all plans and specifications for sewage treatment works, including sanitary sewers, appurtenances, treatment devices, including lagoons, shall be prepared by a registered professional engineer, registered in the State of Missouri. I refer to Senate Bill Number 117, 75th General Assembly, Section 327.181 and Section 327.421. If a registered professional engineer is required to prepare the plans and specifications, presumably his seal would be required on the plans and specifications submitted."

Prior to Senate Bill No. 117, 75th General Assembly, you had made a similar request, and it was our opinion then that the Water Pollution Board should accept plans and specifications submitted by duly appointed city engineers without regard to whether they are licensed in the state. Attorney General Opinion No. 83, December 7, 1960, Smith, copy of which is enclosed.

Section 327.421, RSMo 1969, provides:

"This state and its political subdivisions including counties, cities and towns, or

Honorable Jack K. Smith

legally constituted boards, agencies, districts, commissions and authorities of this state shall not engage in the construction of public works involving the practice of architecture, engineering or land surveying, unless the architectural and engineering drawings, specifications and estimates and the plats and surveys have been prepared by a currently registered architect, professional engineer or land surveyor, as the case may require."

Section 327.181, RSMo 1969, provides:

"Any person practices in Missouri as a professional engineer who renders or offers to render or holds himself out as willing or able to render any service or creative work, the adequate performance of which requires engineering education, training and experience in the application of special knowledge of the mathematical, physical, and engineering sciences to such services or creative work as consultation, investigation, evaluation, planning and design of engineering works and systems, engineering teaching of advanced engineering subjects or courses related thereto, engineering surveys, and the inspection of construction for the purpose of assuring compliance with drawings and specifications, any of which embraces such service or work either public or private, in connection with any utilities, structures, buildings, machines, equipment, processes, work systems, or projects and including such architectural work as is incidental to the practice of engineering; or who uses the title 'professional engineer' or 'consulting engineer' or the word 'engineer' alone or preceded by any word indicating or implying that such person is or holds himself out to be a professional engineer, or who shall use any word or words, letters, figures, degrees, titles or other description indicating or implying that such person is a professional engineer or is willing or able to practice engineering."

It does appear that the preparation of plans and specifications for sewage treatment works involves the practice of engineering, and Section 327.421 applies.

However, no provision of Chapter 327 provides that the Water Pollution Board may or shall enforce such provisions. Nor do we find

Honorable Jack K. Smith

any such authorization or direction in the Water Pollution Law, Chapter 204, RSMo. The Missouri Board for Architects, Professional Engineers, and Land Surveyors is the proper authority to enforce the provisions of Chapter 327.

Therefore, this office adheres to its former opinion that the Water Pollution Board would be in excess of its authority to require that plans submitted be prepared by a licensed engineer. As stated on Page 2 of Opinion No. 83, the Water Pollution Board's duty is to examine the plans submitted and any other information they may have and acquire, and determine whether the facility constructed will cause pollution of the waters of the state.

Very truly yours,

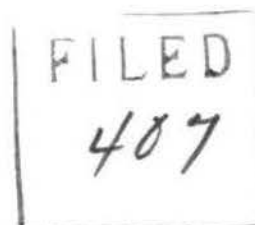
JOHN C. DANFORTH
Attorney General

Enclosure:
OP.83-1960-Smith

Answer by Letter (Bartlett)

July 9, 1970

OPINION LETTER NO. 407



Mr. Hubert Wheeler, Commissioner
State Board of Education
Jefferson State Office Building
Jefferson City, Missouri 65101

Dear Mr. Wheeler:

This letter is in response to your request for our review and certification of the State Board of Education's State Plan, Elementary and Secondary Education Act of 1965, Title III, for the fiscal year 1971.

Our review has taken into consideration Title III of the Elementary and Secondary Education Act of 1965, P.L. 89-10, as amended; the federal regulations (45 CFR 118 draft of May 27, 1970); Article III Section 38(a), and Article IX, Section 2(a), Missouri Constitution; Section 161.092 RSMo 1967 Supp. and related provisions.

It is the opinion of this office that:

1. The Missouri State Board of Education is the "state educational agency" required by Section 305(a)(1), Public Law 89-10, Title III, as amended;

2. The Missouri State Board of Education has authority under State Law to develop, submit, and administer, either directly or through arrangements with other state or local public agencies, the State Plan;

Mr. Hubert Wheeler, Commissioner

3. The State Educational Agency named in the attached State Plan for Title III of the Elementary and Secondary Education Act of 1965 is the agency responsible for the administration of said State Plan;

4. State law does not prohibit effective participation on an equitable basis in programs authorized by this title by children enrolled in any one or more private elementary or secondary schools of such state in the area or areas served by such programs (the undersigned does not certify to the accuracy of paragraph 16 of the State Plan);

5. The State Treasurer has authority under state law to receive, hold, and disburse in accordance with the State Plan funds received under Title III;

6. All provisions of said State Plan are consistent with state law with the exception of paragraph 16.

In conjunction with this letter opinion which constitutes our official certification of the application, we have completed a certification form consistent with this opinion letter.

Very truly yours,

JOHN C. DANFORTH
Attorney General

ELECTIONS:
REGISTRATION:

1. When Henry County, by a vote of the people, adopted the provisions of Chapter 114, RSMo for voter registration, voter registration applied to the City of Clinton in all state and county primary, special and general elections. 2. The City of Clinton, Henry County, Missouri may adopt voter registration for all municipal elections in the manner as provided for in Section 114.047, RSMo, and it would be the duty of the county clerk to furnish the proper registration records to the city election officials.

OPINION NO. 408

December 8, 1970

Honorable Gus Salley
State Representative
One Hundred Sixteenth District
P. O. Box 247
Warsaw, Missouri 65359



Dear Representative Salley:

This is in response to your request for an opinion from this office as follows:

"A few years ago Henry County voted registration of all voting citizens. It was the feeling of the citizens of Clinton that the city would be included at this time. However, the powers of the city said that the city of Clinton was not included in this, and would have to be voted, or the council would have to so declare that voter registration be accepted for the citizens of Clinton.

"I would like the following questions answered:

"1. Can the city through petition of the people hold an election to vote voter registration in a third class city with an inhabitation of 7500 people?

"2. Is it within the power of said council of the city to require voter registration?

Honorable Gus Salley

"3. If the city were to secure voter registration could the city ask the county to furnish them with the registered voters of the city?"

Clinton is located in Henry County, Missouri, a third class county. According to the 1960 Decennial Census, Clinton had a population of 6,925. We have been informed, and assume it to be a fact that Henry County voted to adopt voter registration in 1962.

Chapter 114, RSMo 1969, provides for local option county voter registration and was first enacted in 1959.

Section 114.040, RSMo 1969 provides:

"1. There shall be a registration of all qualified voters in all counties adopting this chapter beginning on the fifteenth day of September next following the date upon which this chapter is adopted, and the registration of voters shall be governed by the provisions of this chapter, except this chapter does not apply where:

"(1) A city in the county has ten thousand or more inhabitants and already has a system of registration under chapter 116 or 118, RSMo, but applies only to the parts of the county as lie outside the corporate limits of the city; nor

"(2) A county has more than two hundred thousand inhabitants and already has a system of registration under chapter 113, RSMo; nor

"(3) A county contains a city or part of a city of more than four hundred thousand inhabitants and already has a system of registration under chapter 119, RSMo.

"2. The general registration of electors qualified to vote in any county shall be held as provided in this chapter, and after so registering a qualified voter in the county is not required to register again, unless obliged to do so by the terms of

Honorable Gus Salley

this chapter. The registration of the elector may be changed, canceled or transferred only as provided in this chapter."

Under this statute, Henry County had authority to adopt voter registration in 1962. When it voted to adopt voter registration, the registration of voters applied to all voters in the county except in cities of 10,000 or more inhabitants, which already had voter registration. Since Clinton did not have 10,000 or more inhabitants in 1962, when Henry County adopted voter registration, voter registration applied to the City of Clinton in all state and county primary, special and general elections as stated in Section 114.240, RSMo.

It is our view that under the facts submitted, the City of Clinton was included when voter registration was adopted in Henry County in 1962 in state and county primary, special, and general elections.

We believe the answer to your questions whether the city council of the City of Clinton has authority to require voter registration is found in Section 114.047, RSMo 1969, which provides as follows:

"1. Any incorporated city, town or village wholly within any county which has adopted this chapter may, by ordinance duly passed by its legislative body, adopt this chapter and make the provisions thereof applicable to municipal elections held within the city, town or village. No ordinance adopting this chapter shall become effective until after the expiration of thirty days from the time of its final passage. If during the thirty-day period a petition signed by a number of qualified voters of the city, town or village at least equal to five percent of the population of the city, town or village, as determined by the last preceding federal decennial census or by a subsequent official census conducted pursuant to the laws of this state, protesting the passage of the ordinance is presented to the legislative body, that body shall submit the ordinance to a vote of the qualified voters of the city, town or village either at the next general election or at a special election to be called for the purpose and the ordinance shall not become effective unless a majority of the

Honorable Gus Salley

qualified voters voting on the proposition vote in favor thereof. At least ten days' notice of the special election shall be given in the manner that the legislative body of the city, town or village directs. While the ordinance is in effect no person shall be permitted to vote in any municipal election held within the city, town or village unless he is registered in the manner provided in this chapter.

"2. No election precinct established in the city, town or village under the provisions of this chapter shall embrace territory outside of the corporate limits of the city, town or village. The officials who now conduct elections in the city, town or village shall continue to do so after the adoption of this chapter untill otherwise provided by law, and the county clerk on the day before any municipal election is to be held in the city, town or village shall deliver the proper registration records to the appropriate election officials.

"3. An ordinance adopting this chapter may be repealed in the manner provided in this section for its enactment.

"4. All laws relating to the conduct of elections in the cities, towns and villages which adopt this chapter shall remain in full force and effect insofar as they do not conflict with the provisions of this chapter."

It is our opinion that the City of Clinton, Henry County, Missouri may adopt voter registration for all municipal elections in the manner and as provided in the above section and the county clerk would be required to furnish the proper registration records to the city election officials.

CONCLUSION

It is the opinion of this office that:

1. When Henry County, by a vote of the people, adopted the provisions of Chapter 114, RSMo for voter registration, voter registration applied to the City of Clinton in all state and county primary, special and general elections.

Honorable Gus Salley

2. The City of Clinton, Henry County, Missouri may adopt voter registration for all municipal elections in the manner as provided for in Section 114.047, RSMo and it would be the duty of the county clerk to furnish the proper registration records to the city election officials.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

Answer by letter-Romines

August 7, 1970

OPINION LETTER NO. 409

Honorable Arthur T. Stephenson
Prosecuting Attorney
Pemiscot County Court House
Caruthersville, Missouri 63830



Dear Mr. Stephenson:

This letter is in response to your request for an opinion of this office concerning the registration of eighteen, nineteen and twenty year old individuals to vote under the Voting Rights Act of 1970. In your question you asked whether the county clerk is "... now to allow eighteen, nineteen, and twenty year olds to register, and are they now qualified to vote in all elections."

Apparently, the county clerk of Pemiscot County is concerned as to whether the passage of the Civil Rights Act of 1970 dictates that he register, and allow to vote in all elections in 1970 those individuals eighteen but not yet twenty-one.

The substantive provisions of Title III of the Voting Rights Act Amendments of 1970 are as follows:

"'Sec. 301.(a) The Congress finds and declares that the imposition and application of the requirement that a citizen be twenty-one years of age as a precondition to voting in any primary or in any elections--

"'(1) denies and abridges the inherent constitutional rights of citizens eighteen years of age but not yet twenty-one years of age to vote--a particularly unfair treatment of such citizens in view of the national defense responsibilities imposed upon such citizens;

Honorable Arthur T. Stephenson

"(2) has the effect of denying to citizens of eighteen years of age but not yet twenty-one years of age the due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment of the Constitution; and

"(3) does not bear a reasonable relationship to any compelling State interest.

"(b) In order to secure the constitutional rights set forth in subsection (a), the Congress declares that it is necessary to prohibit the denial of the right to vote to citizens of the United States eighteen years of age or over.

"Prohibition

"Sec. 302. Except as required by the Constitution, no citizen of the United States who is otherwise qualified to vote in any state or political subdivision in any primary or in any election shall be denied the right to vote in any such primary or election on account of age if such citizen is eighteen years of age or older. . . ."

As is obvious from the foregoing, the intent of the Congress is to allow all those individuals who are otherwise qualified and are over eighteen to be allowed to vote. This Act, however, does not in fact become effective until the 1st of January, 1971, as per Section 305 which states:

"Sec. 305. The provisions of title III shall take effect with respect to any primary or election held on or after January 1, 1971."

Thus, it is a conclusion of this office from the foregoing, that those persons eighteen but not yet twenty-one have not been given the right to vote in any primary or other election of the State of Missouri in the year 1970, and as such the county clerk of Pemiscot County does not have to register those persons eighteen but not yet twenty-one to vote in any elections for 1970.

Yours very truly,

JOHN C. DANFORTH
Attorney General

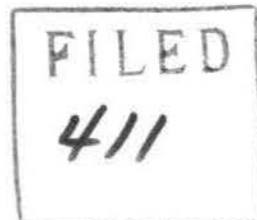
ARREST:
POLICE:
CITY POLICE:
CRIMINAL PROCEDURE:
CITIES, TOWNS & VILLAGES:

A police officer from a fourth class city may arrest for violations of state traffic laws occurring within the city limits and may file a complaint based upon this violation in the magistrate court; a police officer from a fourth class city, possessed of knowledge that a recent felony has been committed, may arrest without a warrant anyone he has reasonable grounds to believe has committed the offense; the arrest for this felony may occur outside the city limits; a police officer from a fourth class city does not have the power to make an ordinance violation arrest outside the city limits; and a fourth class city police chief may not take bond for arrests made without a warrant for offenses that occur within the city limits.

OPINION NO. 411

October 6, 1970

Honorable Gus Salley
State Representative
District No. 116
P. O. Box 247
Warsaw, Missouri 65355



Dear Representative Salley:

This letter is in response to your opinion request concerning the authority of a police officer of a fourth class city. More specifically, your questions and our responses thereto are as follows:

- "1. Can a Fourth Class Police Officer arrest on State Traffic Violations within the city limits and then file the case directly into the Magistrate Court?"

We note initially that prosecutions before magistrates for misdemeanors are required to be initiated by information only. Supreme Court Rule 21.02. Supreme Court Rule 21.03 requires that the information be filed by the prosecuting attorney, although this information may be prompted by a complaint filed with the magistrate having jurisdiction. Supreme Court Rules 21.04 and 37.46. In the case of Kansas City v. Asby, 377 S.W.2d 511 (K.C.Ct.App. 1964), the court noted that Section 543.020, RSMo 1969, requires that prosecutions before a magistrate for misdemeanors shall be by information and shall be filed before the party or parties accused shall be tried. The court concluded, therefore, that a prosecution for a misdemeanor is not commenced by the filing of a complaint, but begins only upon the filing of an information and that no judicial proceedings are

Honorable Gus Salley

commenced by the filing of a police officer's complaint against a misdemeanor.

Thus, if a police officer of a fourth class city filed a complaint in the magistrate court, judicial proceedings against the violator do not commence until the prosecuting attorney files an information based upon his complaint. However, it should be noted that Supreme Court Rule 21.04 obligates the magistrate to transmit the complaint to the prosecuting attorney so that he may determine if filing an information based upon this complaint is warranted under the circumstances.

Also involved in this first question is whether a police officer of a fourth class city has the power to arrest on state traffic violations occurring within the city limits. Applicable is Section 85.610, RSMo 1969, which states:

"The marshal in cities of the fourth class shall be chief of police, and shall have power at all times to make or order an arrest, with proper process, for any offense against the laws of the city or of the state, and to keep the offender in the city prison or other proper place to prevent his escape until a trial can be had before the proper officer, unless such offender shall give a good and sufficient bond for his appearance for trial. The marshal shall also have power to make arrests without process, in all cases in which any offenses against the laws of the city or of the state shall be committed in his presence." (Emphasis added)

This statute is consistent with the common law which held that any peace officer had authority to arrest for a misdemeanor committed in his presence without a warrant. State v. Parker, 378 S.W.2d 274 (Spr.Ct.App. 1964).

Your second question was as follows:

"2. Can a fourth Class Police Officer make an arrest on a felony charge and then file the case himself with the Prosecuting Attorney, or does the Police Officer have to make the arrest, call the sheriff, and then let him take over?"

Again, we call your attention to Section 85.610, RSMo 1969, which specifically permits a police officer in a fourth class city

Honorable Gus Salley

". . . to make arrests without process, in all cases in which any offenses against the laws of the city or of the state shall be committed in his presence." In view of this statute, there would be no necessity for the assistance of the sheriff, as the statute clearly enables a police officer to arrest for commission of a felony.

Your third question was as follows:

"3. Can a fourth class police officer, that has seen or has reasons to believe a felony has been committed, be allowed to chase or try to apprehend a car that has left his city limits?"

In the case of State v. Keeny, 431 S.W.2d 95 (Mo. 1968), a city policeman from a third class city was advised by the victim of a robbery as to the description of the robber's automobile and as to its general direction of travel from the scene of the robbery. He sighted a car fitting this description approximately ten miles outside the city limits, and succeeded in getting it to stop. Upon arresting the occupants and searching the automobile, evidence was produced which led to the occupants' conviction for the robbery. In affirming this conviction, the Missouri Supreme Court held:

"This arrest was lawful and this being so, the ensuing search of the automobile as here described, was lawful, as incident thereto. The fact that policeman Grimes was outside his jurisdiction does not make the arrest unlawful under the circumstances before us. A private citizen could lawfully have proceeded as Grimes did. The facts are that there was a robbery; within a few minutes after it occurred, Grimes learned from a reliable source that the perpetrator was a man with a gun who left the scene in a particular style and color car, . . . Within 16 minutes from the time he was first called about the robbery he overtook such a car. . . . Under these circumstances, Grimes had reasonable grounds to believe that the men in the car were the ones who committed the robbery and could lawfully arrest them without warrant, . . ." (Id. at 97)

See also State v. Murray, 445 S.W.2d 296 (Mo. 1969), where an arrest similar to the one occurring in the Keeny case was upheld as valid even though made outside the city limits by a city police officer. Thus, assuming that the police officer has "reasonable grounds to

Honorable Gus Salley

believe" a felony has been committed by the person he is pursuing, then he may chase and try to apprehend that person outside the city limits.

Your fourth question was as follows:

"4. Can a fourth class police officer give a traffic ticket to a subject that has committed a driving offense within the city limits, although the officer cannot get the subject stopped until he is two or three blocks out of the city limits?"

In the case of Hacker v. City of Potosi, 351 S.W.2d 760 (Mo. En Banc 1961), the Missouri Supreme Court stated:

"We have held that a police officer of a fourth class city (which Potosi was) has no authority to arrest without a warrant outside the city limits in nonfelony cases. (City of Advance ex rel. Henley v. Maryland Casualty Co., Mo. Supp., 302 S.W.2d 28, and authorities cited; as to arrest with warrant see Sec. 98.540; statutory citations are to RSMo and V.A.M.S.)" (Id. at 761)

The above question is consistent with well settled Missouri law that municipal officers do not have power to make ordinance violation arrests outside city limits. The only statutory exception to this rule, which does not apply in your case, is that hot pursuit of ordinance violators across city lines is permitted in St. Louis County. The statute which permits this exception (Section 544.157, RSMo 1969) is strictly limited to pursuits by peace officers in St. Louis County, however. Thus, no arrest may be made by police officers from a fourth class city outside the city limits for an ordinance violation committed within the city limits. We parenthetically note that this limitation does not prevent the police officer from filing a complaint upon which a summons or warrant for the arrest of the offender may be had, however.

Your fifth question was as follows:

"5. Is a fourth class city police chief that is bonded allowed to take bond on offenses that happened in the city limits?"

We assume that this question refers to arrests made without a warrant. Our examination of Missouri law indicates no statutory authority for the taking of such a bond by such an officer after

Honorable Gus Salley

a warrantless arrest. The lack of this authority leads us to conclude that such officer does not have authority to take bonds under these circumstances. We do not pass on the question of the marshal's authority in the event that there is an ordinance purporting to allow the marshal to set and accept such a bond.

CONCLUSION

It is, therefore, the opinion of this office that a police officer from a fourth class city may arrest for violations of state traffic laws occurring within the city limits and may file a complaint based upon this violation in the magistrate court; that a police officer from a fourth class city, possessed of knowledge that a recent felony has been committed, may arrest without a warrant anyone he has reasonable grounds to believe has committed the offense; that the arrest for this felony may occur outside the city limits; that a police officer from a fourth class city does not have the power to make an ordinance violation arrest outside the city limits; and that a fourth class city police chief may not take bond for arrests made without a warrant for offenses that occur within the city limits.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Craig A. Van Matre.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

COSMETOLOGY:

WIGS:

1. Department store sales personnel who receive compensation either from the store or from the customer for combing, brushing and arranging individuals' hair in the process of selling or servicing wigs are practicing the occupation of hair-dresser within the meaning of Section 329.020, RSMo 1969, and must obtain a certificate of registration from the State Board of Cosmetology. 2. The department store in which the occupation of hair-dresser is practiced must also obtain a certificate of registration from the State Board of Cosmetology.

OPINION NO. 412

September 16, 1970

Honorable Jack E. Gant
State Senator
Sixteenth District
9517 East 29th Street
Independence, Missouri 64052



Dear Senator Gant:

This official opinion is issued in response to your request concerning the following question:

"I have received several inquiries from constituents in regard to the practice of stores in the selling and servicing of wigs.

"I have been advised that numerous department stores are combing, brushing, and arranging individuals' hair in the process of selling this merchandise. I am further advised that this is done by sales people and not by licensed people under the State Board of Cosmetology.

"Thus, I would appreciate it if you would provide me with an opinion as to

Honorable Jack E. Gant

whether any sanitation statutes or regulations of the State Board of Cosmetology are being violated by this practice."

Section 329.020, RSMo 1969, provides in part as follows:

"Any person who engages for compensation in any one or any combination of the following practices, to wit: Arranging, dressing, curling, singeing, waving, permanent waving, cleansing, cutting, bleaching, tinting, coloring or similar work upon the hair of any person by any means shall be construed to be practicing the occupation of a hairdresser. . . ."

Section 329.030, RSMo 1969, prescribes that:

". . . It shall be unlawful for any person in this state to engage in the occupation of hairdresser. . . , or to conduct a hairdressing. . . establishment. . . , unless such person shall have first obtained a certificate of registration as provided by this chapter."

Section 329.050, RSMo 1969, details the qualifications that an applicant must possess in order to obtain a certificate of registration as a hairdresser.

It is clear that department store sales personnel perform hairdressing services, as defined in Section 329.020, supra, by combing, brushing, and arranging individuals' hair in the process of selling and servicing wigs. Such persons must be certified as hairdressers if they perform their services for compensation.

Department store sales personnel who comb, brush and arrange individuals' hair in the process of selling or servicing wigs, obviously perform their services for compensation when they are paid a specified rate of remuneration directly by the customer for the hairdressing services alone, or when they are paid a single fee directly by the customer for the wig and the hairdressing services together. While the amount of the compensation paid for hairdressing services in the latter instance may be uncertain, it is clear that part of the compensation is consideration for such services. Section 329.020, supra, does not require that the amount of compensation be clearly ascertainable in every instance.

Honorable Jack E. Gant

Such sales personnel also engage in performing hairdressing services for compensation when remunerated by the department store for performing hairdressing services alone or for performing such services in conjunction with selling and servicing wigs. Section 329.020, supra, does not require that the compensation be paid directly by the customer to the person performing the hairdressing services.

Such department store sales personnel may also perform hairdressing services for compensation by accepting tips regularly given by customers. In Attorney General Opinion No. 20, dated February 3, 1953, to the Honorable Robert E. Crist, this office expressed the opinion that a person who performs hairdressing services in her home without charge but accepts tips regularly given by her customers is practicing as a hairdresser for compensation within the meaning of Section 329.020, RSMo 1969, and must obtain a certificate of registration. A copy of that opinion is enclosed.

Thus, if department store sales personnel receive compensation for combing, brushing and arranging customers' hair in the process of selling or servicing wigs they are practicing the occupation of hairdresser, as defined in Section 329.020, supra, and must obtain the necessary certificate of registration. In addition, the store itself in which the occupation of hairdresser is practiced is required to obtain a certificate of registration under Section 329.045, RSMo 1969.

CONCLUSION

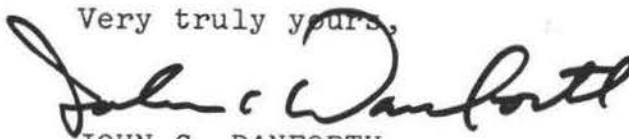
Therefore, it is the opinion of this office that:

1. Department store sales personnel who receive compensation either from the store or from the customer for combing, brushing and arranging individuals' hair in the process of selling or servicing wigs are practicing the occupation of hairdresser within the meaning of Section 329.020, RSMo 1969, and must obtain a certificate of registration from the State Board of Cosmetology.

2. The department store in which the occupation of hairdresser is practiced must also obtain a certificate of registration from the State Board of Cosmetology.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Harvey M. Tettlebaum.

Very truly yours,



JOHN C. DANFORTH
Attorney General

Enclosure:

Op. No. 20
2-3-53, Crist

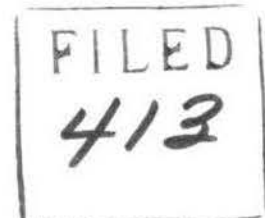
See: State ex rel. Lack v. Melton, 629 S.W.2d 302 (Mo. banc 1985).

ASSESSORS: With respect to Senate Bill No. 1
COMPENSATION: of the Third Extra Session, 75th
DEPUTIES: General Assembly: 1. Pursuant
SALARIES: to the provisions of subsection 3
(Section 53.071, RSMo) of said bill,
the salary of a county assessor whose year of incumbency begins
September 1, 1970, would be computed on the basis of the assessed
valuation of the county for the year 1969 and the salary for each
succeeding year is to be computed on the basis of the assessed valua-
tion of the county for the preceding year. 2. In counties of the
second, third, and fourth class, the salary of each clerk and deputy
appointed by the county assessor subject to the approval of the coun-
ty court shall be paid entirely by the county. 3. The provisions
of subsection 3 of said bill (Section 53.081, RSMo) requiring the
assessor of each county, except counties of the first class having
a charter form of government, to verify ten sales of real property
made in the county each month and make a report to the State Tax
Commission do not apply to township assessors in counties having
a township form of government. 4. The provisions of subsection
3 of said bill (Section 53.091, RSMo) requiring the assessors of
this state to attend a course of study as prescribed by the State
Tax Commission includes township assessors. 5. The provisions of
subsection 3 (Section 137.330, RSMo) of said bill are applicable
only to counties of the first class.

OPINION NO. 413

September 18, 1970

Honorable Haskell Holman
State Auditor
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Holman:

This is in response to your request for an official opinion
on questions arising from certain provisions of Senate Bill No.
1 passed by the Third Extra Session of the 75th General Assembly.
In your opinion request you point out that subsection 3, Section
51.071 of Senate Bill No. 1 provides:

"For the purpose of computing an assessor's
salary, the term 'assessed valuation' means
the total assessed valuation of his county as
computed by the state tax commission for the
tax year immediately preceding the tax year
for which the salary is paid. The state tax
commission shall provide the department of
revenue with each such computation of valua-
tion made by them."

Honorable Haskell Holman

You present your first question as follows:

"In that the year of incumbency of an assessor is from September 1 to August 31 of the next year, would the applicable 'per year salary' as set forth in subdivisions 1 through 14 of Section 53.071 be payable for the fiscal year of the assessor and the amount of compensation for each to be determined on the basis of the assessed valuation of each county as of December 31 of the year preceding the beginning of each year of incumbency?"

The basic rule of statutory construction is to seek the intention of the lawmakers and, if possible, to effectuate that intention. The court should ascertain legislative intent from the words used if possible and should ascribe to the language used its plain and rational meaning. *State ex rel. Clay Equipment Corporation v. Jensen*, 363 S.W.2d 666 (Mo. En Banc 1963).

Section 137.080, RSMo 1969, provides that real estate and tangible personal property shall be assessed annually at the assessment which commences on the first day of January. Accordingly, the salary of an assessor whose year of incumbency begins September 1, 1970, would be computed on the basis of the assessed valuation of the county for the year January 1, 1969, to December 31, 1969, since that is the tax year immediately preceding the tax year for which the salary is paid.

Your next question is as follows:

"From the provisions contained in subsection 1, Section 53.071 Senate Bill Number 1, relating to payment of salaries of clerks and deputies of assessors, is it to be interpreted that - all salaries of clerks and deputies appointed by each assessor, subject to the approval of the county court, in counties of second, third and fourth classes, except counties adopting township organization, are payable in their entirety by the respective counties?"

Subsection 1, Section 53.071 of Senate Bill No. 1 provides:

"For the performance of their existing statutory duties and for the additional duties set forth in sections 53.081 and 53.091, each county assessor, except in counties of the first class having a charter form of government, shall

Honorable Haskell Holman

receive an annual salary for his services and shall, subject to the approval of the county court, appoint the additional clerks and deputies that he deems necessary for the prompt and proper discharge of the duties of his office. A portion of each county assessor's salary and of the salaries for his clerks and deputies shall be paid by the state in an amount equal to the sum paid by the state for assessors', clerks', and deputies' compensation in that county in the year 1969, and the remainder of the assessors' salary and the salaries for his clerks and deputies shall be paid by his county.
. . ."

The manner in which the salary of each clerk and deputy appointed by the assessor shall be paid is set forth in subsection 2 of Senate Bill No. 1 as follows:

"Each assessor shall be paid his salary in equal monthly installments by his county. Each clerk and deputy appointed by the assessor shall be paid his salary in equal monthly installments by his county. The state shall remit its share of each assessor's salary and clerk and deputy hire to each county in equal monthly installments for deposit in the general revenue fund of that county."

No payment was made or is to be made by the state for salaries of clerks or deputies of assessors in 1969 in second, third or fourth class counties not under township organization. It follows that all the salaries of clerks and deputies of county assessors in second, third, and fourth class counties must be paid in their entirety by such counties.

Your third question is as follows:

"Are the requirements and provisions contained in Sections 53.081 and 53.091 Senate Bill 1, applicable to Township Assessors in counties having Township Form of Government?"

Section 53.081, Senate Bill No. 1 provides in part:

"The assessor in each county, except counties of the first class having a charter form of government, in addition to other duties provided by law, shall each calendar month verify

Honorable Haskell Holman

ten sales of real property made within his county during that month and shall make a report of these sales to the state tax commission. . . ."

Section 53.091, Senate Bill No. 1 provides in part:

"The assessors of this state, in addition to their other duties, shall attend a course of studies as prescribed by the state tax commission as is herein provided. . . ."

In Section 53.081 the legislature specifically refers to "the assessor in each county." Inasmuch as the term assessor is used in the singular, it appears that the legislature has expressed the intention that this section shall be applicable only in counties having county assessors, except counties of the first class having a charter form of government. On the other hand, in Section 53.091 the legislature specifically refers to "the assessors of this state." Here the term assessors is used in the plural and the words "all assessors of this state" apparently include township assessors.

In your last question you ask whether Section 137.330 as amended by Senate Bill No. 1 is applicable to counties of the first class. Section 137.325, RSMo 1969, provides as follows:

"The provisions of sections 137.325 to 137.420 shall apply only to counties within the first class as provided by law."

Section 137.330, as amended by Senate Bill No. 1 of the Third Extra Session, 75th General Assembly, is as follows:

"One-half of all the costs and expenses of making the assessment and in the preparation of abstracts of assessment lists and tax bills shall be paid by the state, but in calculating these costs and expenses no amount shall be allowed for the salaries of the assessors, his clerks, and his deputies in excess of that provided in section 53.071, RSMo. When the amount due has been determined by the state director of revenue, he shall pay such claim out of funds appropriated for that purpose."

It appears, therefore, that Section 137.330 as amended by Senate Bill No. 1 is applicable only to first class counties.

Honorable Haskell Holman

CONCLUSION

It is the opinion of this office with respect to Senate Bill No. 1 of the Third Extra Session, 75th General Assembly, approved June 22, 1970, that:

1. Pursuant to the provisions of subsection 3 (Section 53.071, RSMo) of said bill, the salary of a county assessor whose year of incumbency begins September 1, 1970, would be computed on the basis of the assessed valuation of the county for the year 1969 and the salary for each succeeding year is to be computed on the basis of the assessed valuation of the county for the preceding year.

2. In counties of the second, third, and fourth class, the salary of each clerk and deputy appointed by the county assessor subject to the approval of the county court shall be paid entirely by the county.

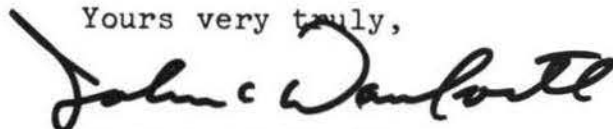
3. The provisions of subsection 3 of said bill (Section 53.081, RSMo) requiring the assessor of each county, except counties of the first class having a charter form of government, to verify ten sales of real property made in the county each month and make a report to the State Tax Commission do not apply to township assessors in counties having a township form of government.

4. The provisions of subsection 3 of said bill (Section 53.091, RSMo) requiring the assessors of this state to attend a course of study as prescribed by the State Tax Commission includes township assessors.

5. The provisions of subsection 3 (Section 137.330, RSMo) of said bill are applicable only to counties of the first class.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, L. J. Gardner.

Yours very truly,



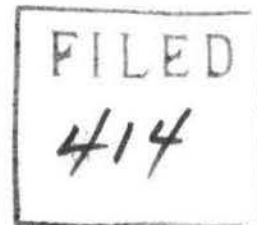
JOHN C. DANFORTH
Attorney General

Answer by Letter (Klaffenbach)

July 13, 1970

OPINION LETTER NO. 414

Honorable Robert E. Young
State Representative
District No. 133
208 West Macon Street
Carthage, Missouri 64836



Dear Representative Young:

This letter is in response to your opinion request, in which you ask whether the second paragraph of Section 17 of Senate Bill No. 22 of the Seventy-fifth General Assembly is in violation of Section 23 of Article III of the Missouri Constitution relating to titles of bills.

The provision in question is presently designated by the Revisor of Statutes as Section 59.319 and states as follows:

"A user fee of one dollar shall be charged and collected by every recorder in this state, over and above any other fees required by law, as a condition precedent to the recording of any instrument conveying real property or any interest therein. The fee shall be forwarded monthly by each recorder of deeds to the state collector of revenue, and the fees so forwarded shall be deposited by the collector in the state treasury."

Senate Bill No. 22 is titled "AN ACT Relating to a state land survey authority, with penalty provisions and with an effective date." The Act creates a "State Land Survey Authority". Section 17, as indicated, provides for the collection of a user fee of one dollar.

Honorable Robert E. Young

Section 23 of Article III of the Missouri Constitution states:

"No bill shall contain more than one subject which shall be clearly expressed in its title, except bills enacted under the third exception in Section 37 of this article and general appropriation bills, which may embrace the various subjects and accounts for which moneys are appropriated."

It is clear that this section of the Constitution is mandatory and the title of an act should point to a single subject matter and matters germane thereto. Williams v. Atchison, T. & S. F. Ry. Co., 233 Mo. 666, 136 S.W. 304. A legislative act is not unconstitutional as covering more than one subject if all matters contained therein are germane to the general subject. Spitcaufsky v. Hatten, 353 Mo. 94, 182 S.W.2d 86.

Likewise, the courts have held that where the title of a legislative bill is general, it is more comprehensive than when it descends to particulars. Downey v. Schrader, 353 Mo. 40, 182 S.W.2d 320. The mere generality of the title will not prevent the act from being valid where the title does not tend to cover up or obscure legislation which is in itself incongruous, and has no necessary or proper connection. State v. Mullinix, 301 Mo. 385, 257 S.W. 121.

Titles of acts should be liberally construed to support the power sought to be exercised by the legislature. Willhite v. Rathburn, 332 Mo. 1208, 61 S.W.2d 708.

Legislation will be upheld in case of doubt if it is germane to the title, and relates either directly or indirectly to the main subject of the act. State ex rel. Lorantos v. Terte, 324 Mo. 402, 23 S.W.2d 120. Further, the court in determining whether the title to a bill is liable to mislead the members of the legislature may trace the act in its passage through the legislature. State ex rel. United Rys. Co. v. Wiethaupt, 231 Mo. 449, 133 S.W. 329.

Senate Bill No. 22 as introduced in the Seventh-fifth General Assembly contained the provision in question under what was designated as Section 18. The original introduced version stated that Section as follows:

Section 18. For the purpose of financing the work of this authority, and providing the funds necessary for its work, a user fee of one dollar shall be charged and collected by every recorder in this state, over and above any other fees required by law,

Honorable Robert E. Young

as a condition precedent to the recording of any instrument conveying real property or any interest therein. The fee shall be forwarded monthly by each recorder of deeds to the state collector of revenue, and the fees so forwarded shall be deposited by the collector in the state treasury." (Emphasis added).

The portion of the section which we have underscored above, was eliminated in the perfected version of the bill, and in addition, the perfected version of the bill added to the title the words "and with an effective date".

In our view, this section was intended by the legislature to relate to the financing of the Authority, and for that reason, was and is germane to the title of the act. Presumably the portion omitted in the perfected version was omitted for the purpose of eliminating unnecessary language. This does not, in our view, detract from the obvious legislative intent that the user fee has a germane relationship to the entire act.

For the reasons stated, we are of the opinion that the provision in question is not in violation of Section 23 of Article III of the Constitution.

Very truly yours,

JOHN C. DANFORTH
Attorney General

RECORDER OF DEEDS: Instruments subject to the one dollar user
REAL PROPERTY: fee provided by Section 59.319, RSMo 1969,
FEES: include warranty deeds, quit claim deeds,
trustee's deeds, collector's deeds, executor's deeds, administrator's deeds, guardian's deeds, sheriff's deeds in partition, highway deeds, cemetery deeds, tax deeds, wills which devise real property, leases of real property, all instruments which convey easements, patents of land, probate and circuit court decrees which convey real property interest, and all distributions of the probate court involving real property. Instruments which do not convey an interest in real property and are not subject to the user fee include deeds of trust, deeds of release (full and partial), uniform commercial code security instruments involving fixtures and crops, instruments which release uniform commercial code security interests, probate and circuit court decrees which do not convey real property interests, distribution orders which do not involve real property, leases on personal property, affidavits, surveys, plats (where easements are not established), patents on inventions, death certificates, marriage licenses, powers of attorney, articles of incorporation, articles of dissolution, resolutions and statements.

September 28, 1970

OPINION NO. 415

Honorable Haskell Holman
State Auditor
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Holman:

This is in reply to your request for an official opinion from this office concerning the following question as it appears in your letter:

"What specific instruments constitute 'any instrument conveying real property or any interest therein' for which recorders shall charge and collect the one dollar fee?"

Section 59.319, RSMo 1969, provides as follows:

"A user fee of one dollar shall be charged and collected by every recorder in this state, over and above any other fees required

Honorable Haskell Holman

by law, as a condition precedent to the recording of any instrument conveying real property or any interest therein. The fee shall be forwarded monthly by each recorder of deeds to the state collector of revenue, and the fees so forwarded shall be deposited by the collector in the state treasury."

As a practical matter, this opinion is limited to a discussion of those instruments which are normally and regularly recorded in a recorder's office.

The wording of Section 59.319 limits the one dollar user fee to instruments " . . . conveying real property or any interest therein."

The word "conveyance" is a flexible term, the meaning of which is to be determined according to the manner in which it is used. Bates v. State Savings Bank, 136 Kan.767, 18 P.2d 143 (1933). An instrument qualifies as a conveyance when it carries from one person to another an interest in land. State v. Sutterfield, 176 S.W.2d 666 (St.L.Ct.App.1944).

The word "interest" as used in a recording statute, when referring to an interest in land, is the broadest term applicable to claims in or upon real property, and is broad enough to include every right, title or interest in realty. Pennsylvania Range Boiler Co. v. City of Philadelphia, 344 Pa.34, 23 A.2d 723 (1942).

The most obvious example of an instrument which conveys an interest in real property is a deed. A "deed" is by definition a written instrument whereby an interest in real property is conveyed or transferred from a grantor to a grantee. New Home Building Supply Company v. Nations, 259 N.C.681, 131 S.E.2d 425 (1963). It is clear that every kind of deed which conveys a present interest in land, whether that interest be a fee simple, life estate, easement, or whatever, does "convey an interest in real property" and is subject to the one dollar user fee provided by Section 59.319. The kinds of deeds which qualify include a warranty deed, quit claim deed, executor's deed, administrator's deed, tax deed, sheriff's deed in partition, highway deed, cemetery deed, and perhaps others.

A lease is a conveyance of an estate in realty which divests the owner of a certain estate for a given time. Mattingly's Executor, et al., v. Brents, 159 S.W.1157 (Ky App.1913). To "lease" is to transfer (or convey) property for a certain specified term, from the lessor to the lessee. Moorshead v. United Railways Company, 96 S.W.261 (St.L.Ct.App.1906). By its very definition, a lease of real estate involves the conveyance of a real property interest and as such, clearly comes within the scope of Section 59.319.

The user fee is to be charged in connection with recording of a will where an interest in real property is involved. It is our view

that a will does in fact convey a real property interest when it contains a devise of land. Shaw v. Wertz, 369 S.W.2d 215 (Mo.1963).

An easement is an interest in real property which involves the title to the land. Allen v. Smith, 375 S.W.2d 874 (Mo.1964). Thus, whenever an instrument establishes an easement, such instrument is subject to the one dollar user fee since it thereby conveys an interest in real property. Normally, a "plat" will not involve the conveyance of a real property interest. However, if a plat contains roadway or other types of easements, it is subject to the fee.

A "land patent" is an instrument by which the government, whether state or national, passes its title. Since land patents convey real property interests, it is clear that they are subject to the user fee.

It should be noted that the language of Section 59.319 is broad enough to cover all forms and orders of the probate court, such as orders of distribution, and orders approving wills, as well as orders of the circuit court which do in fact convey or transfer any legal interest in real estate. Also, all court decrees, such as quiet title decrees, which convey an interest in real property, are subject to the fee.

There are several instruments recorded in the various recorder of deeds offices which obviously do not convey an interest in real property and, therefore, are not within the scope of Section 59.319. Those instruments include affidavits, surveys, patents on inventions, plats (which do not establish easements), death certificates, marriage licenses, powers of attorney, certificates of incorporation, articles of dissolution, resolutions, statements, and court decrees or orders which do not involve a conveyance of real estate.

In Missouri, a security interest in land is obtained by the use of a deed of trust rather than by the use of a common law mortgage. On its face, a deed of trust appears to transfer title to the real estate from the mortgagor to the trustee. However, the courts in this state have held that the trustee under a deed of trust does not receive legal title at the time the trust deed is executed. Lustenberger v. Hutchison, 119 S.W.2d 921 (Mo.1938). In this state, a "mortgage" or "deed of trust" is a mere security for the payment of a debt and is not an outright conveyance of title to realty. In re Title Guaranty Trust Company, 113 S.W.2d 1053 (Mo.1938). In the case of Missouri Real Estate and Loan Company v. Gibson, 220 S.W.675 (Mo. 1920), the Missouri Supreme Court said:

" * * * Notwithstanding a few attributes that still inhere in it as a result of its common-law origin, a mortgage, or deed of trust in the nature of a mortgage, given on land to secure the payment of a debt, is now regarded in this state as being, in its last analysis, a lien and nothing more. Dickerson v. Bridges, 147 Mo.235,244, 48 S.W.825; Terminal Ice & Power Co. v. Ins. Co., 196 Mo.App.241,248,

Honorable Haskell Holman

194 S.W.722. So viewed, it is neither an estate in land, nor a right to any beneficial interest therein. It is neither jus in re nor jus ad rem. It is merely the right to have the debt, if not otherwise paid, satisfied out of the land. * * * "(Id.at 676)".

Thus in this state, a deed of trust conveys merely a lien and nothing more. This raises the question whether a "lien" on real property amounts to an "interest" therein.

In Koenig v. Leppert-Roos Fur Company, 260 S.W.756 (Mo.1924), the St. Louis Court of Appeals stated:

" * * * A lien is not a property in or right to the thing itself, but constitutes a charge or security thereon. 25 Cyc.660." (Id. at 758).

In Wakefield v. Dinger, 135 S.W.2d 17 (Mo.1939), the court said that a mortgage or deed of trust is nothing more than chattel interest. Since the trustee under a deed of trust holds only a lien on the land and since that lien does not amount to an interest in real property in Missouri, it is the opinion of this office that a deed of trust does not convey any "interest in real property" and as such is not subject to the user fee provided by Section 59.319.

Since a deed of trust does not convey an interest in real estate, it follows that an instrument which serves to release that lien interest is treated in the same manner. Therefore, any deed of release (whether full or partial) which releases a trustee or mortgagee's lien interest does not convey an interest in real property and does not come within the scope of Section 59.319.

As stated above, in Missouri a security interest on real property is merely a lien and as such does not amount to an interest in real property. Missouri Real Estate and Loan Company v. Gibson, supra; Koenig v. Leppert-Roos Fur Company, supra. Since a security interest on real property itself does not rise to the level of an "interest in real property," it follows that a security interest in fixtures or crops does not amount to an interest in the real property to which the fixtures are attached or upon which the crops are growing. As a result, those instruments relating to security interest in fixtures or crops, which are required under Section 400.9-401, RSMo 1969, to be recorded with the recorder of deeds located in the county where the mortgage (deed of trust) on the real estate would be located, are not instruments which convey an interest in real property. In like manner, the release of such instruments may be recorded without payment of the fee.

CONCLUSION

Therefore, it is the opinion of this office that instruments subject to the one dollar user fee provided by Section 59.319, RSMo

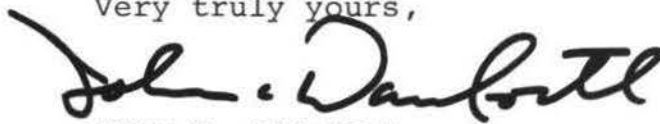
Honorable Haskell Holman

1969, include warranty deeds, quit claim deeds, trustee's deeds, collector's deeds, executor's deeds, administrator's deeds, guardian's deeds, sheriff's deeds in partition, highway deeds, cemetery deeds, tax deeds, wills which devise real property, leases of real property, all instruments which convey easements, patents of land, probate and circuit court decrees which convey real property interest, and all distributions of the probate court involving real property.

Instruments which do not convey an interest in real property and are not subject to the user fee include deeds of trust, deeds of release (full and partial), uniform commercial code security instruments involving fixtures and crops, instruments which release uniform commercial code security interests, probate and circuit court decrees which do not convey real property interests, distribution orders which do not involve real property, leases on personal property, affidavits, surveys, plats (where easements are not established), patents on inventions, death certificates, marriage licenses, powers of attorney, articles of incorporation, articles of dissolution, resolutions and statements.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John E. Park.

Very truly yours,

A handwritten signature in black ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a stylized "D".

JOHN C. DANFORTH
Attorney General

Answer by Letter (Wieler)

September 11, 1970

OPINION LETTER NO. 417
Answer by letter-Wieler

Honorable J. Anthony Dill
State Representative
District No. 44
8011 Grandvista Avenue
Affton, Missouri 63123



Dear Representative Dill:

This is in response to your request for an opinion as to the question of whether the directors of a fire protection district located in the first class county having a charter form of government, said district organized pursuant to Chapter 321, RSMo 1959, must follow the procedures set forth in the Missouri Administrative Procedure Act, Chapter 536, RSMo, when such directors discharge or suspend a fireman employee of the district.

It is our understanding that the procedures mentioned in your request are those contained in Section 536.060 to 536.095, RSMo 1969, which set forth the methods to be followed by an agency when instituting a proceeding in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing.

Section 536.010, RSMo 1969, reads as follows:

"For the purpose of this chapter

"(1) 'Agency' means any administrative officer or body existing under the constitution or by law and authorized by law to make rules or to adjudicate contested cases;

"(2) 'Contested case' means a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing;

Honorable J. Anthony Dill

"(3) the term 'decision' includes decisions and orders whether negative or affirmative in form;

"(4) 'Rule' includes every regulation, standard, or statement of policy or interpretation of general application and future effect, including the amendment or repeal thereof, adopted by an agency, whether with or without prior hearing, to implement or make specific the law enforced or administered by it or to govern its organization or procedure, but does not include regulations concerning only the internal management of the agency and not directly affecting the legal rights or privileges of, or procedures available to the public."

Fire protection districts are organized and given the power to make rules and regulations pursuant to Chapter 321, RSMo 1969. As such, they fall within the definition of an "agency" as set forth in Section 536.010, RSMo 1969. The question here, however, involves the definition of "contested case" and its application to fire protection districts organized pursuant to Chapter 321, RSMo 1969. The procedural requirements of Sections 536.060 to 536.095 apply only in those instances where rights, duties or privileges of specific parties are required by law to be determined after a hearing. To make these provisions applicable here, there must be a showing that the directors of a fire protection district organized pursuant to Chapter 321, RSMo, are required by law to hold a hearing before discharging or suspending a fireman employee of the district.

In *State ex rel. Leggett v. Jensen*, 318 S.W.2d 353 (Mo. 1958), the Supreme Court granted a writ of prohibition against a judge of a circuit court and prohibited him from exercising jurisdiction in an action against the State Superintendent of Insurance. In reaching this decision, the Supreme Court determined that the review provisions of the Administrative Procedure Act did not apply to plaintiffs' action against the superintendent. The Supreme Court stated:

"... There is no doubt whatever that plaintiffs' claim is a claim about which there is a contest, but a 'contested case', to which the provisions of the statutes invoked by plaintiffs apply, has a much narrower meaning than that." *Id.* at 355

In discussing the term "contested case," the Supreme Court said:

"... The definition section . . . states that 'contested case' means a proceeding before an

Honorable J. Anthony Dill

agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing.' (Emphasis ours throughout.) We think this means that a 'contested case' (to which the Administrative Procedure Act and its judicial review provisions apply) is a case which must be contested before an administrative agency because of a requirement (by constitutional provision, statute, municipal charter provision or ordinance; . . .) for a hearing before it of which a record must be made unless waived. . . ." Id. at 356

* * *

"The trouble with plaintiffs' contention (as to their right to invoke the review procedure of Secs. 536.100 and 536.110) is that they can point to no law requiring a hearing on their claim before the Superintendent such as is required to make it a contested case before him within the meaning of the Act. . . ." Id. at 358

The reasoning of this decision was followed in the recent case of Kopper Kettle Restaurants, Inc. v. City of St. Robert, 439 S.W.2d 1, 3 (Spr.Ct.App. 1969):

". . . This [Section 536.010, RSMo 1969] means that a contested case, in the context of the Administrative Procedure Act, is a case which must be contested because of some requirement by statute, municipal charter, ordinance or constitutional provision for a hearing of which a record must be made unless waived. State ex rel. Leggett v. Jensen, supra, 318 S.W.2d at 356[2]."

We have surveyed Chapter 321, RSMo 1969, and are unable to find language requiring that a hearing be held before a fireman employee can be discharged or suspended. Thus, there can be no "contested case" before a fire protection district organized pursuant to this chapter and, therefore, the procedures set out in Sections 536.060 to 536.095, RSMo 1969, are not applicable to this agency.

Yours very truly,

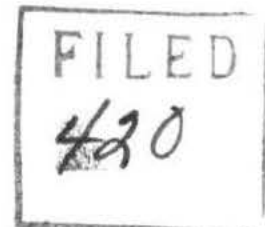
JOHN C. DANFORTH
Attorney General

[ANSWER BY LETTER - KLAFFENBACH]

OPINION LETTER NO. 420

July 27, 1970

Honorable James C. Kirkpatrick
Secretary of State
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Kirkpatrick:

This letter is in response to your request for an opinion which states in part as follows:

"Petitions exercising the right of the initiative and proposing a constitutional amendment have been received in this office and are being examined to determine their sufficiency.

Section 126.040 requires that 'each and every sheet of every such petition containing signatures shall be verified. . . ' according to a form and affidavit set out in that section. The affidavit requires that the person signing it copy the names of the signers on the petition and that he or she make the oath before a person entitled to give such."

Your first question asks whether a petition is void and the Secretary of State therefore cannot count the names signed on such petition if the affidavit does not contain the names of the persons who signed the petition.

You also inquire as to whether such a petition is deficient if it lacks the affidavit.

Honorable James C. Kirkpatrick

Insofar as the first question is concerned, Section 126.040 RSMo 1969, clearly indicates that the forms are not mandatory and if substantially followed, in any petition shall be sufficient. This point was considered in Sayman v. Becker, 269 S.W. 973, wherein the Supreme Court of Missouri stated at l.c. 977:

"V. It is contended there are 19 names not set out in the affidavits of the circulators on the back of the sheets on which the names appear, and that these cannot be counted. The affidavit, in each instance, was to the effect that the name of each petitioner was signed in the circulator's presence, that the circulator believes each signer had stated his name, post office address, and residence correctly, and that each signer is a legal voter of the state of Missouri and of the Twelfth congressional district. In the petition each signer made equivalent statements. The statutory form is expressly made directory by the statute (section 5908, R. S. 1919), and the substantial thing is the verification of the facts stated in the affidavit."

Therefore, we conclude that the fact that the verification required by Section 126.040 fails to repeat the names of such signers does not in itself make such petition fatally defective so as to preclude the Secretary of State from counting the names signed to such petition.

With respect to your second question, it is clear that the affidavit is expressly required by the statute and its absence is not just a clerical or technical error. Kaesser v. Becker, 243 S.W. 346, 352.

Very truly yours,

JOHN C. DANFORTH
Attorney General

WORKMEN'S COMPENSATION:
FIREMEN:

The provisions of Sections 87.005 and 87.006, RSMo 1969, relating to impairment of health of firemen, do not apply to the Missouri Workmen's Compensation Law.

August 3, 1970



OPINION NO. 421

Honorable A. Clifford Jones
Senator, Seventh District
9 Clermont Lane
Clayton, Missouri 63124

Dear Senator Jones:

We have for consideration your request for an opinion regarding whether or not Sections 87.005 and 87.006, RSMo 1969, are applicable under the Missouri Workmen's Compensation Law.

Section 87.005 provides:

"1. Notwithstanding the provisions of any law to the contrary, after five years' service, any condition of impairment of health caused by any disease of the lungs or respiratory tract, hypertension, or disease of the heart resulting in total or partial disability or death to a uniformed member of a paid fire department, who successfully passed a physical examination within five years prior to the time a claim is made for such disability or death, which examination failed to reveal any evidence of such condition, shall be presumed to have been suffered in line of duty, unless the contrary be shown by competent evidence.

"2. This section shall apply only to the provisions of chapter 87, RSMo 1959."

Chapter 87, RSMo, pertains to "Firemen's Retirement and Relief Systems" and is so captioned. The Workmen's Compensation Law is set out in Chapter 287, RSMo 1969.

Section 87.006, provides:

"1. Notwithstanding the provisions of any law to the contrary, and only for the purpose of computing retirement benefits provided by an

Honorable A. Clifford Jones

established retirement plan, after five years' service, any condition of impairment of health caused by any disease of the lungs or respiratory tract, hypotension, hypertension, or disease of the heart resulting in total or partial disability or death to a uniformed member of a paid fire department, who successfully passed a physical examination within five years prior to the time a claim is made for such disability or death, which examination failed to reveal any evidence of such condition, shall be presumed to have been suffered in line of duty, unless the contrary be shown by competent evidence.

"2. This section shall apply to paid members of all fire departments of all counties, cities, towns, fire districts and other governmental units."

This Section specifies that it is "only for the purpose of computing retirement benefits provided by an established retirement plan, . . ."

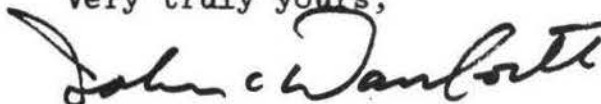
It appears that specific provision of each of the above sections precludes its application to the Missouri Workmen's Compensation Law.

CONCLUSION

It is the opinion of this office that the provisions of Sections 87.005 and 87.006, RSMo 1969, relating to impairment of health of firemen, do not apply to the Missouri Workmen's Compensation Law.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Carroll J. McBride.

Very truly yours,

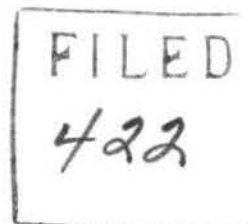


JOHN C. DANFORTH
Attorney General

Answer by Letter (Klaffenbach)

July 20, 1970

OPINION LETTER NO. 422



Honorable Patrick J. O'Connor
State Representative, 30th District
4252 Brampton
Bridgeton, Missouri 63042

Dear Representative O'Connor:

This letter is in response to your opinion request which you ask whether Section 8.05 of the City Charter of Bridgeton, Missouri is constitutional and also in which you ask whether such section prohibits an employee of the city, who resides in another municipality, from becoming a candidate for office in the municipality in which he resides.

Section 8.05 states:

"No person seeking employment by the city or promotion in employment shall either directly or indirectly give, render, or pay any money, service or other thing of value to any person for or on account of or in connection with his test, appointment, proposed appointment, promotion, or proposed promotion.

No employee of the city other than elected officials shall continue in such employment after becoming a candidate for any public office.

The provisions of this section may be enforced

Honorable Patrick J. O'Connor

in any court of competent jurisdiction, and upon conviction of violating or conspiring to violate the provisions hereof, a person shall be punished by a fine of not less than one hundred dollars (\$100.00) and not more than five hundred dollars (\$500.00). The conviction of any employee of such offense shall operate automatically to terminate his service. Any employee so removed shall not be reinstated into city service."

In answer to your first question concerning the constitutionality of the section quoted, it is our view that this section has no constitutional infirmity. We note that the provisions are similar to those relating to the State Merit System, Section 36.150 RSMo. 1959, which prohibits a merit system employee from being a candidate for nomination or election to any public office and we do not question the constitutionality of such provisions.

With respect to your second question concerning whether that section of the charter prohibits such an employee from becoming a candidate for office in another municipality in which he resides, it is our view that the question is strictly local in nature, and for that reason, this office should not pass upon the interpretation of the charter. We suggest, however, that, again by comparison with the State Merit System Law the terminology "any public office" as contained in the charter provision is identical to the language "any public office" as contained in Section 36.150 which has been given a broad interpretation.

We enclose Opinion No. 45, dated May 1, 1953, to Mr. James, which interprets the pertinent State Merit System provisions.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosure

October 19, 1970

OPINION LETTER NO. 423

Honorable Hugh A. Sprague
Prosecuting Attorney
Buchanan County Courthouse
St. Joseph, Missouri 64501



Dear Mr. Sprague:

This letter is in response to your opinion request in which you summarize your question as follows:

"Where a warrant has erroneously been issued and paid out of the county general fund budget for an insurance premium which should have been paid out of the special road and bridge fund budget, and the county court has attempted to correct the error by issuing a special road and bridge fund warrant in the same amount payable to the general fund, and where both warrants have been paid and processed and are no longer subject to cancellation, can the money thus transferred from the special road and bridge fund to correct the error be deposited in the general fund for expenditure during the current budget year, or must it be placed in the county revenue fund to be used to pay off protested warrants and thereby not be available for expenditure out of the current year's budget?"

You indicted in the above question that the payment was for an insurance premium which should have been paid out of the special road and bridge fund. However, we do not have the

Honorable Hugh A. Sprague

question of the propriety of such a payment before us, and our review of the question as posed is limited to the transfer of such funds.

We have reviewed the applicable statutes and find no reason why such a transfer cannot be made. A transfer of money from the road and bridge fund to the general fund of the county would not change the 1970 county budget or expenditures out of the 1970 county budget because the actual expenditures out of each fund for lawful purposes would be in compliance with the 1970 budget. A transfer of funds to replace funds that were improperly paid out would not increase the lawful expenditures out of either fund, but would be the only way the 1970 budget could lawfully be carried out because crediting the expenditures to the proper funds (which is the result of such transfers) is in compliance with the 1970 budget.

It is, therefore, our view that the county court under these circumstances does have the authority to rectify the error by transferring such funds from the road and bridge fund to the general fund for expenditure during the current budget year.

Very truly yours,

JOHN C. DANFORTH
Attorney General

November 18, 1970

OPINION LETTER NO. 424

Answered by Letter - Mansur

Mr. Lee E. Norbury
Executive Secretary
Missouri State Soil and Water
Districts Commission
705 Hitt - University of Missouri
Columbia, Missouri 65201



Dear Mr. Norbury:

This is in response to your request for an opinion from this office as follows:

"Does a County Court have the authority to grant an easement for the temporary flooding of a county road?

"In the past such an easement has been granted by some County Courts to Watershed Subdistricts where it appears that a flood detention impoundment will cause flooding over a road for a short period of time. The authority to do this has been questioned by the Counsel for the U. S. Department of Agriculture."

You inquire whether an easement can be granted by a county court to a watershed subdistrict where it appears that a flood detention impoundment will cause flooding over a public road for a short period of time.

County courts or township boards, in counties under town-

Mr. Lee E. Norbury

ship organization, have control over all public roads in the county; except state highways, county highways, and roads in special road districts which have exclusive control over the road within their respective jurisdiction. This opinion is restricted to public roads under the jurisdiction of a county court.

Counties, like other public corporations, can exercise only powers granted them by statute in express words, those necessarily and fairly implied in regard to the powers expressly granted. Any act done or contracted in excess of their authority is null and void. Their rights and powers and liabilities are specifically limited by the statute. Article VI, Section 7 Constitution of Missouri. Lancaster v. Atchinson County, 180 S.W.2d 706, 352 Mo. 1039; Thompson v. City of Malden, 118 S.W.2d 1059; Ballard's Estate v. Clay County, 355 S.W.2d 894.

In State ex rel Sikeston v. Missouri Utilities Co., 53 S.W.2d 394, the issue before the court was the use of the city streets by a public utility for their pole and line wires. In discussing the authority to use the streets, the court stated l. c. 397:

"The rule must be considered settled, that no person can acquire a right to make a special or exceptional use of a public highway, not common to all the citizens of the state, except by grant from the sovereign power.' Jersey City Gas Co. v. Dwight, 29 N.J. Eq. 242, cited with approval in McQuillin on Municipal Corporations (2d Ed.) § 1745, note 59, vol. 4 pp. 643, 644. The power to grant franchises resides in the state, and a city, in granting a franchise, acts as agent for the state. In an effort to prevent usurpation of such delegated power, it is not improper for a municipality to be relator in a quo warranto proceeding. State ex inf. Jones v. Light & Development Co., 246 Mo. 618, 637, 152 S. W. 67."

In 40 C.J.S. Highway §220, the general rule of law in regard to obstructing public highways is stated as follows:

"Obstructions in a highway may be authorized by act of legislature, or by the municipality in which the road lies. Such authority, however, must be strictly construed and cannot lawfully be exercised in such a manner

Mr. Lee E. Norbury

as to constitute a source of danger to the public, or prevent the ordinary use of the highway.

"Highway officers have no power to surrender the use of the highway for private purposes, or to authorize a nuisance on the highway. If the public authorities, in authorizing an obstruction, exceed their powers, such obstruction will be illegal; nor can an illegal obstruction be justified by matters occurring thereafter and subsequent to the commencement of a prosecution therefor. Although a dam authorized by the legislature is not a public nuisance for which indictment or injunction will lie, a county whose highway is flooded may nevertheless sue for damages."

We are unable to find any statute authorizing a county court to grant an easement to permit the flooding of a public road by Watershed Subdistricts.

It is the view of this office that a county court does not have authority to grant an easement to permit the flooding of a public road under its jurisdiction by watershed protection and flood prevention subdistrict.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Answer by Letter (Romines)

August 17, 1970

OPINION LETTER NO. 425

Honorable Carl R. Noren, Director
Missouri Department of Conservation
2901 North Ten Mile Drive
P. O. Box 180
Jefferson City, Missouri 65101



Dear Mr. Noren:

This letter is in response to your request for an opinion of this office in which you ask:

"Your official opinion is requested touching the authority of the Conservation Commission to purchase public liability insurance coverage on its employees while they are driving motor vehicles owned by the Commission."

We consider this a request which asks whether it is within the discretion of the Conservation Commission to pay the premiums for liability insurance coverage on its employees while they are driving motor vehicles owned by the Commission to be paid as compensation to such employees.

Consistent with Article IV, Section 42, the Conservation Commission is given authority to fix the qualifications and salaries of the Director and all other employees of the Commission:

"The commission shall appoint a director of conservation who, with its approval, shall appoint the assistants and other employees deemed necessary by the commission. The commission shall fix the qualifications and salaries of the director and all ap-

Honorable Carl R. Noren, Director

pointees and employees, and none of its members shall be an appointee or employee."

As can be seen, Conservation Commission is given broad discretion in setting the qualifications and salaries of its employees. Neither the Constitution, nor the statutes, limit the form or manner in which the Commission may choose to pay its employees their compensable salaries.

By former opinion, a copy of which is attached, Opinion No. 93, Cason, 9-9-1969, this office stated that compensation was generally interpreted so as to include the purchasing of insurance for an employee, and thus we held that a school board was given authority to purchase an individual liability insurance policy on an employee to cover his negligence occurring during the normal activities of the school district. Likewise, we find that the Conservation Commission is given authority to set salaries and compensate its employees and is not prohibited in the form in which such compensation may be given, and thus it is the conclusion of this office that the Conservation Commission is given authority to purchase liability insurance coverage on its employees for that period of time in which they drive motor vehicles owned by the Commission as part of the compensation of such employee.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosure:

Op. No. 93,
9-9-69, Cason

Answer by letter-Blackmar, A.

July 28, 1970

OPINION LETTER NO. 426

Honorable Marvin L. Dinger
State Representative
District No. 128
Rural Route 1
Ironton, Missouri 63650



Dear Representative Dinger:

This letter is in response to your request for an opinion concerning the boundaries of the 128th District of the House of Representatives and the 149th District of the House of Representatives.

On March 31, 1966, the Reapportionment Commission filed with the Secretary of State a final statement of the numbers and boundaries of the State House Districts. The Commission fixed the boundaries of the 128th District as:

"Dent County except Sinking Township; Iron County and the following area in St. Francois County: Iron Township and all that portion of Randolph Township except the parts of the cities of Desloge, Rivermines and Elvins that lie in Randolph Township." Page 4307, RSMo 1969.

The Commission fixed the boundaries of the 149th District as:

"St. Francois, Perry, Marion and Big River townships, and that portion of the City of Desloge, the City of Rivermines and the City of Elvins that lie in Raldolph [sic] township, all in St. Francois County." Page 4308, RSMo 1969.

The Commission indicated that except for districts lying in Jackson County, St. Louis, and St. Louis County, all boundaries,

Honorable Marvin L. Dinger

including county boundaries, township boundaries and ward and precinct boundaries are those existing on March 1, 1966, except when otherwise noted. See, State Representative Districts, Revised Statutes of Missouri, 1969, page 4304. Therefore, neither the 128th Legislative District nor the 149th Legislative District is affected by changes in the boundaries of the City of Desloge occurring after March 1, 1966, and references in the description of each district to the City of Desloge are to boundaries of the city on March 1, 1966.

If residents of both the 128th Legislative District and the 149th Legislative District vote at the same polling place, it will be necessary for the election judges to determine from the definition of the boundaries of each district in which district the voter resides and to provide the voter with a ballot listing candidates from his district. Section 111.441, RSMo 1969, requires a person desiring to vote to give his residence, when requested, to the judges of election. With this information the judges will then be able to determine the legislative district in which the voter resides and provide him with the proper ballot.

Yours very truly,

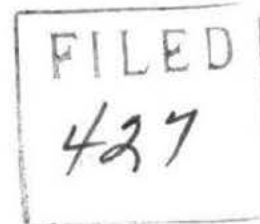
JOHN C. DANFORTH
Attorney General

Answer by Letter (Klaffenbach)

July 27, 1970

OPINION LETTER NO. 427

Honorable Gene Hamilton
Prosecuting Attorney
Callaway County Court House
Fulton, Missouri 65251



Dear Mr. Hamilton:

This letter is in response to your opinion request in which you ask concerning whether the probate court of the county wherein a state mental hospital is located is required by law to hear applications filed by medical officers of the state hospital for the commitment of persons now over 21 years of age who were originally committed as juveniles to the Division of Mental Health by juvenile court order and who have since been transferred from another such state hospital to the present institution wherein they are committed. You also mention that there is a problem involved concerning the payment of costs of these hearings if the probate court of a county wherein the facility is located has the duty to hear them since apparently the counties allegedly responsible have refused to pay the cost of the hearings.

We enclose our Opinion No. 537 dated December 2, 1969 to White which is self-explanatory.

With respect to the cost of such hearings, we passed upon the subject in our Opinion No. 537-1969 and we reiterate that, unless the patient makes application to have the hearing held in his county of residence under Subsection 9 of Section 202.807 RSMo 1969 the statute requires that the hearing be held where the facility is located and under Subsection 10 of that section any fees for all services required of the probate judge, clerk or court for which reimbursement has not otherwise been made shall be paid at the expense of the county of residence.

Honorable Gene Hamilton

The law is clear that, under these circumstances, it is the duty of the county court of the county of the proposed patient's residence to pay for such expenses and a refusal to do so does not affect the jurisdiction of such probate court.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosure: Opinion No. 537

COUNTY JUDGES:
CRIMINAL LAW:
CONFLICT OF INTEREST:

Section 49.140, RSMo 1969, would be violated if the financial statement of the county or any legal notices of the county were printed at the expense of the county in a newspaper owned by a member of the county court or his wife.

September 11, 1970

OPINION NO. 428

Honorable Harold Dickson
State Representative
District No. 121
400 West Russell
California, Missouri 65018



Dear Representative Dickson:

This is in response to your request for an official opinion stated as follows:

"In a third class county, would a presiding judge who also owns a newspaper be in conflict of interest if he publishes any financial statements of official notices for the county?

"Should he be in conflict of interest, could he then transfer the newspaper to his wife and would the conflict of interest still exist?"

We believe it unnecessary to decide whether the "conflict of interest law" would be violated in such circumstances because the provisions of Section 49.140, RSMo 1969, are clearly violated when county financial statements are published in a newspaper owned by a county judge of such county or owned by the wife of such judge.

Section 49.140, RSMo 1969, which prohibits county judges from doing certain things, provides in part:

Honorable Harold Dickson

"No judge of any county court shall, directly or indirectly, become a party to any contract to which the county is a party, . . ."

Section 49.150, RSMo 1969, provides as follows:

"Any judge of the county court who shall violate any of the provisions of section 49.140 or who shall do any of the acts or enter into any of the contracts prohibited or declared unlawful in said section, shall be punished by a fine not exceeding one thousand dollars for each offense, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment."

Section 432.070, RSMo 1969, requires all contracts with a county to be in writing. Any agreement between a county and a newspaper incurring any liability of the county to pay for printing the financial statement of the county or any legal notices, has to be in writing signed by the parties. Certainly, a county judge is prohibited under Section 49.140, supra, from entering into a contract creating any liability between the county and the newspaper he owns.

In Githens v. Butler County, 165 S.W.2d 650, our supreme court held that under the common law a contract made by a public officer with himself, or in which he is interested, is against public policy and tainted with illegality. In this case the wife of a county judge purchased real estate from the county. It was a quiet title suit in which the county claimed the deed was void. In discussing the provisions of what is now Section 49.140, supra, the court stated:

"* * * The directors of a private corporation may, if there is no fraud in fact or unfairness in the transaction, contract on behalf of the corporation with one of their number. A stricter rule is laid down in regard to public corporations, and it is held that a member of an official board or legislative body is precluded from entering into a contract with that body.' 6 Williston, Contracts, §1735, p. 4895. The basis of this common law rule is that

Honorable Harold Dickson

it is against public policy (State ex rel. Smith v. Bowman, 184 Mo.App. 549, 170 S.W. 700) for a public official to contract with himself. 'At common law and generally under statutory enactment, it is now established beyond question that a contract made by an officer of a municipality with himself, or in which he is interested, is contrary to public policy and tainted with illegality; and this rule applies whether such officer acts alone on behalf of the municipality, or as a member of a board of [or] council. * * * The fact that the interest of the offending officer in the invalid contract is indirect and is very small is immaterial. * * * It is impossible to lay down any general rule defining the nature of the interest of a municipal officer which comes within the operation of these principles. Any direct or indirect interest in the subject matter is sufficient to taint the contract with illegality, if the interest be such as to affect the judgment and conduct of the officer either in the making of the contract or in its performance. In general the disqualifying interest must be of a pecuniary or proprietary nature.' 2 Dillon, Municipal Corporations, §773; 46 C.J.S., §308; 22 R.C.L., § 121; State ex rel. Streif v. White, Mo.App., 282 S.W. 147; Witmer v. Nichols, 320 Mo. 665, 8 S.W.2d 63; Nodaway County v. Kidder, 344 Mo. 795, 129 S.W.2d 857.

"This basic and fundamental common law concept has been enacted into our statute law relating to county courts. Mo.R.S.A. § 2491 provides that:

'No judge of any county court in the state shall, directly or indirectly, become a party to any contract to which such county is a party, * * *.'

"The next section of the statute makes the violation of the statute a misdemeanor. Mo. R.S.A. § 2492.

Honorable Harold Dickson

"The cases cited in the preceding paragraphs deal with instances of an official being 'directly' interested in the contracts, actions or dealings with the public body of which he was a member. Here the question is whether the public official is so 'indirectly' interested as a party to a transaction with a county court of which he was a member as to invalidate it. In fact the question is whether the relationship of husband and wife is a disqualifying interest within the meaning of the statute and common law prohibition against an official's becoming indirectly interested in a public contract. The two opposing lines of cases are collected in the following: Thompson v. School Dist. No. 1, 252 Mich. 629, 233 N.W. 439, 74 A.L.R. 792; O'Neill v. Auburn, 76 Wash. 207, 135 P. 1000, 50 L.R.A., N.S., 1140; 6 Williston, Contracts, p. 4898.

"An indirect interest may be so remote as to not avoid a bargain between an official and the public body he represents, consequently when the interest is not direct there is more reason for considering each case on its special facts. 6 Williston, Contracts § 1735; Thompson v. School Dist. No. 1, 252 Mich. 629, 233 N.W. 439, 74 A.L.R. 790.

"Here the respondent urges that she purchased the land in question with her own separate funds and that under our statute her husband cannot interfere with her separate real property. § 3390, R.S.Mo. 1939, Mo.R.S.A. § 3390. But the husband is under a duty to and is liable for his wife's support (Nielsen v. Richards, 75 Cal.App. 680, 243 P. 697) and in this state he is entitled to dower in his wife's real estate, Mo. R.S.A. §§ 319, 324 either of which are pecuniary interests and disqualifying under statutes requiring such an interest even though it is indirect. Nuckols v. Lyle, 8 Idaho 589, 70 P. 401; Beakley v. City of Bremerton, 5 Wash.2d 670, 105 P.2d 40.

Honorable Harold Dickson

Though the husband may have no present interest in his wife's separate estate there can be no question but that because of the relationship he does have such a beneficial interest in her property and affairs as to be 'indirectly' interested in any contract to which she is a party. *Clark v. Utah Construction Co.*, 51 Idaho 587, 8 P.2d 454. But aside from these pecuniary reasons it is obvious, it seems to us, that a county judge's wife may not purchase real estate from the county and court of which her husband is a member acting in a quasi-judicial capacity. Though the bargain may be ever so fair it places the officer in a position which might become antagonistic to his public duty. *Throop*, Public Officers, § 607; 22 R.C.L., § 121; *Goodyear v. Brown*, 155 Pa. 514, 26 A. 665, 20 L.R.A. 838, 35 Am. St.Rep. 903. Under most circumstances, if not all, it is simply against public policy for the wife of a county judge to purchase land from a county when the sale requires the vote and opinion of her husband as a member of the court passing on the transaction. *Clark v. Utah Construction Co.*, supra; *Sturr v. Elmer*, 75 N.J.L. 443, 67 A. 1059."

The court held the contract void and cancelled the deed.

Although the husband as a member of the county court voted for the sale of the land by the county to his wife, we believe that is immaterial. As we view this Section 49.140, it is not a question of whether he participated by voting but whether he indirectly became a party, due to the fact his wife was the purchaser.

We believe the decision of the court would have been the same even though he had not participated in the transaction. It was held in *Wood v. Elliott*, 29 Pitt. Leg.J. (Pa.) 334; *Bay v. Davidson*, 133 Iowa 688 and *Stover v. Baraugh of Elmer* (N.J.) 67 A. 1059, that contracts between a municipal corporation and the wife of a public officer are void as against public policy even though the husband did not participate or vote.

CONCLUSION

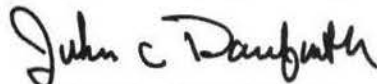
It is the opinion of this office that Section 49.140, RSMo

Honorable Harold Dickson

1969, would be violated if the financial statement of the county or any legal notices of the county were printed at the expense of the county in a newspaper owned by a member of the county court or his wife.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

Very truly yours,

A handwritten signature in cursive script, reading "John C. Danforth".

JOHN C. DANFORTH
Attorney General

Answer by Letter (Jones)

September 30, 1970

OPINION LETTER NO. 430



Dr. Robert T. Foster, President
Northwest Missouri State College
Maryville, Missouri 64468

Dear Dr. Foster:

This is to acknowledge receipt of your request for an opinion from this office in regard to whether or not the Board of Regents of Northwest Missouri State College are prohibited by the provisions of Sections 290.060 and 290.040, RSMo 1969, from employing a female teacher during the three weeks prior to and the three weeks following the birth of a child to such teacher.

Section 290.060, RSMo 1969, makes it a misdemeanor to knowingly employ a female in any of the various kinds of establishments specified in Section 290.040 within three weeks before or three weeks after childbirth. Section 290.040 provides that no female shall be employed more than nine hours during any one day, or more than fifty-four hours during any one week in any of the diverse kinds of establishments and places of industry therein described, including any public institution incorporated or unincorporated. The primary issue then is whether the Missouri Legislature intended to include Northwest Missouri State College within the term "public institution, incorporated, and unincorporated."

It is a firmly established rule of statutory construction that a state and its subdivisions and agencies are not to be

Dr. Robert T. Foster

considered as within the scope of a statute, however general and comprehensive the statutory language may be, unless the intention to include them is clearly manifest. 82 C.J.S., Statutes, Section 317 (p.554). This rule is applicable in construing a penal statute such as Section 290.040, RSMo 1969. In this connection, this office has previously advised in Opinion No. 25, April 17, 1953, Duncan, (copy attached) that the use of the phrase "public institution, incorporated or unincorporated," was not sufficiently clear and definite to manifest a legislative intent to include state hospitals therein.

It is therefore our view that Section 290.060, RSMo 1969, which makes it a misdemeanor for any person, firm or corporation to knowingly employ a female or permit a female to be employed in any of the diverse kinds of establishments, places of industry, or places of business specified in Section 290.040, within three weeks before or three weeks after childbirth, does not apply to female teachers of state colleges in Missouri. As a result of our views on this issue, the other questions that have been raised in regard to the constitutionality of Sections 290.040 and 290.060, RSMo 1969, are inapplicable.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosure:

Op. No. 25
4-17-53, Duncan

Answer by letter-Klaffenbach

August 25, 1970

OPINION LETTER NO. 431



Honorable Phil Snowden
State Representative, 86th District
313 Armour Road
North Kansas City, Missouri 64116

Dear Representative Snowden:

This letter is in response to your Opinion Request in which you ask the following:

"A constituent of mine informs me that certain members of railroad train crews have been required to furnish a drivers license information to City Police and Highway Patrol in grade crossing accidents within the State of Missouri. My first question is whether or not this is legal and if so, does Section 564.450 cover this situation or does some other section apply?

Secondly, can members of the crew be charged with careless and reckless driving and if so, what section or sections cover this particular situation?"

Section 564.450, RSMo 1969, states:

"No person operating or driving a vehicle on the highway knowing that an injury has been caused to a person or damage has been caused to property, due to the culpability of said operator or driver, or to accident, shall leave the place of said injury,

Honorable Phil Snowden

damage or accident without stopping and giving his name, residence, including city and street number, motor vehicle number and chauffeur's or registered operator's number, if any, to the injured party or to a police officer, or if no police officer is in the vicinity, then to the nearest police station or judicial officer."

We note that this section is the same as that contained in Subsection (f) of Section 8401 of the Revised Statutes of 1939 and was later the subject of revision in 1949, House Bill 2154. In the context of the Revised Statutes of 1939 the section clearly pertained only to motor vehicles although the term "vehicle" was used in Subsection (f) instead of "motor vehicle". As you are no doubt aware a railroad train being operated exclusively upon tracks is specifically excepted from the definition of "motor vehicle" as contained in Section 301.010 (17), RSMo 1969.

We also note that the words "highway" and "vehicle" are defined in Chapter 304 relating to traffic regulations. Section 304.025, RSMo 1969, therein states:

"1. The word 'highway' whenever used in sections 304.014 to 304.026 shall mean any public road or thoroughfare for vehicles, including state roads, county roads and public streets, avenues, boulevards, parkways or alleys in any municipality.

2. The word 'vehicle' whenever used in sections 304.014 to 304.026 shall mean any device operated on highways, except those exclusively on rails or tracks."

In our view, the operator or crew of a railroad train are not persons "operating or driving a vehicle on the highway" within the meaning of Section 565.450, RSMo 1969, and that section does not apply.

Paragraph 2 of Section 302.181, RSMo 1969, which pertains to the carrying and display of drivers licenses states:

Honorable Phil Snowden

"The license issued shall be carried at all times by the holder thereof while driving a motor vehicle, and shall be displayed upon demand of any officer of the highway patrol, or any police officer or peace officer, or any other duly authorized person, for inspection when demand is made therefor. Failure of any chauffeur or operator of a motor vehicle to exhibit his license to any of the aforesaid officers, or other duly authorized officer, shall be presumptive evidence that such person is not a duly licensed chauffeur or motor vehicle operator."

It is our view, however, that paragraph 2 of Section 302.181 pertains only to operators of motor vehicles as defined in Section 301.010 and we know of no law requiring a member of a train crew to display a motor vehicle drivers license because of the train being involved in a grade crossing accident.

Your second question with respect to "careless and reckless driving" is not clear, however, we find no such statutory provision applicable to railroad train crews. You have not advised us concerning any statute alleged to be applicable.

We note that you additionally call into question the application of Section 9 of Article XI of the Constitution which states:

"All railways in this state are hereby declared public highways, and railroad corporations common carriers. Laws shall be enacted to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on all railroads in this state."

In our view, this section of the Constitution does not make a railway a public highway for the purpose or application of the motor vehicle traffic regulations. In this respect, the Supreme Court of Missouri in Farber v. Mo. Pac. Ry. Co., 116 Mo. 81, 22 S.W. 631, stated at l.c. 633 that the object of this provision "was to lay a foundation for certain kinds of legislative regulation

Honorable Phil Snowden

of railways, but not to change the nature of the use of railroad property, or to divert it from the general purposes for which it was designed."

Very truly yours,

JOHN C. DANFORTH
Attorney General

Answer by letter-Blackmar, A.

July 31, 1970

OPINION LETTER NO. 432

Mr. Gene Sally, Director
Department of Community Affairs
Jefferson State Office Building
Jefferson City, Missouri 65101



Dear Mr. Sally:

This letter is in response to your request for an opinion concerning a new townsite for the City of Pattonsburg, Missouri. You state:

"The City of Pattonsburg is being inundated due to the construction of a reservoir by the United States Army Corps of Engineers. The City of Pattonsburg is at this time preparing for relocation, and has been granted certain privileges by Senate Bill No. 200.

"Senate Bill No. 200 enables a city to plat a parcel of land outside the present city limits to serve as a location for the new townsite. A question has arisen as to how many acres are required in the plat for the new townsite. Will your office please give official opinion clarifying the number of acres necessary in the new townsite. Thank you very much."

Senate Bill No. 200, 75th General Assembly, was enacted into law and is now found in Sections 71.016 through 71.019, RSMo 1969. Those sections make no mention of the number of acres required in a plat for a new townsite. In Section 71.017 it is provided that the plat shall contain the same information as required by the laws of this state to be contained in a plat for a new townsite. Laws relating to plats for new townsites are found in Chapter 445, RSMo 1969. Chapter 445 makes no reference to the number of acres required for a plat for a new townsite. We find no other statutory

Mr. Gene Sally

section that would be applicable to the question of how many acres are required in the plat for the new townsite. Therefore, we are of the opinion that the legislature has imposed no specific requirements concerning the number of acres required for a new townsite organized under the provisions of Sections 71.016 to 71.019, RSMo 1969, and that the number of acres required is within the discretion of the legislative body of the city, town or village concerned, in this case the City of Pattonsburg.

Yours very truly,

JOHN C. DANFORTH
Attorney General

SCHOOLS:

Two or more three-director (common) school districts cannot organize into a six-director district.

OPINION NO. 433

November 25, 1970

Honorable John T. Russell
State Representative
District No. 125
State Capitol Building
Jefferson City, Missouri 65101



Dear Representative Russell:

This is in response to your request for an opinion concerning the school reorganization laws contained in Chapter 162 of the Revised Missouri Statutes. Specifically, you have asked whether two or more three-director (common) school districts can organize into a reorganized six-director district and then proceed to hold a special election to elect the new six-director school board.

Section 162.211, RSMo 1969, provides:

"A six-director school district may be established by the voters of

* * *

"(4) Any common school district which has two hundred or more children of school age by the last enumeration or any two or more adjacent common school districts which together have an area of fifty square miles or have an enumeration of at least two hundred children of school age."

Section 162.221, RSMo 1969, sets forth the procedure for organizing a proposed six-director district by voters of the above enumerated common or three-director districts. Adoption of the proposed six-director district can only be accomplished by a majority vote of the qualified residents of the proposed school district at a special election held pursuant to Section 162.191, RSMo 1969.

It is clear then that these statutes provide a method for creating a six-director school district by the voters of a common or three-director school district which has two hundred or more children of school age or by the voters of any two or more adjacent

Honorable John T. Russell

common or three-director school districts which together have an area of fifty square miles or at least two hundred children of school age.

However, a new section was added to Chapter 162 by the 75th General Assembly, in 1969. Section 162.096, sub. 2, RSMo 1969, which became effective on August 25, 1969, provides:

"2. If any school district is not operating as a six-director school district and has not combined its territory with that of one or more districts which do operate as a six-director district through one of the procedures provided by law within three years after August 25, 1969, the state board of education shall assign the territory of the district to one or more districts which do operate a high school. The assignments shall be announced not later than January 15, 1973." (Laws 1969, S.B. 187)

This section is clearly contrary to the provisions of Section 162.211(4). It specifically provides that any three-director school district operating in this state subsequent to August 25, 1969, must combine its territory with that of one or more districts which are operating as a six-director district within three years or be assigned to such a district by the State Board of Education. Although repeals by implication are not favored, the Missouri Supreme Court has said that such a result must be reached where two statutes are so repugnant that both cannot stand. *State ex rel. Preisler v. Toberman*, 364 Mo. 904, 269 S.W.2d 753, 754 (banc 1954); *Kansas City Terminal Railway Company v. Industrial Commission*, 396 S.W.2d 678, 683 (Mo. 1965). Where two acts are repugnant, the later act, without any repealing cause, operates to the extent of the repugnancy as to repeal the first. *City of Kirkwood v. Allen*, 399 S.W.2d 30, 34 (Mo. banc 1966). As the latest pronouncement of the legislature's will, Section 162.096, sub. 2, is controlling and must be given full effect.

Inasmuch as Section 162.096, sub. 2, RSMo 1969, provides that a three-director district can no longer combine with another three-director district to form a six-director district, the procedure for doing so as contained in Section 162.221, RSMo 1969, is no longer applicable.

CONCLUSION

Therefore, it is the opinion of this office that two or more three-director (common) school districts cannot organize into a six-director district.

Honorable John T. Russell

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Richard L. Wieler.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

JOHN C. DANFORTH
Attorney General

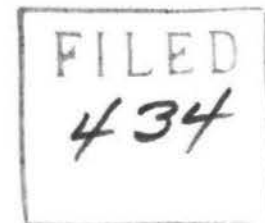
STATE AUDITOR:
COUNTY AUDITS:

(1) It is the duty of the State Auditor to audit the accounts of the various county officers, in counties of the third and fourth class, supported in whole or in part by public moneys, at least once during the term for which any county officer is chosen. (2) The time of making such audit during the term of each county officer shall be as near the expiration of the term of the county officer as the auditing force of the State Auditor will permit, as determined by the State Auditor.

OPINION NO. 434

August 3, 1970

Honorable John T. Russell
State Representative
District No. 125
P. O. Box 93
Lebanon, Missouri 65536



Dear Representative Russell:

This is in response to your request for an official opinion of this office with respect to the following inquiry:

"I have noticed there seems to be some conflict concerning the frequency of audits of county offices. The question I pose is, how often is the State Auditor's Office required to perform an audit of the various third and fourth class county offices?"

Your inquiry is answered by Section 29.230, RSMo 1969, which provides, as follows:

"1. In every county which does not elect a county auditor, the state auditor shall audit, without cost to the county, at least once during the term for which any county officer is chosen, the accounts of the various county officers supported in whole or in part by public moneys. The audit shall be made as near the expiration of the term of office as the auditing force of the state auditor will permit.

"2. The state auditor shall audit any political subdivision of the state, including counties having a county auditor, if requested to do so by a petition signed by five percent of the qualified voters of the political subdivision

Honorable John T. Russell

determined on the basis of the votes cast for the office of governor in the last election held prior to the filing of the petition. The political subdivision shall pay the actual cost of audit. No political subdivision shall be audited by petition more than once in any one calendar or fiscal year."

Our opinion is limited to the duty imposed upon the State Auditor under subsection 1 of 29.230, RSMo 1969.

Counties of the third and fourth class do not elect a county auditor. Therefore, the provisions of Section 29.230(1), RSMo 1969, are applicable. That subsection requires the auditor to audit, at least once during the term for which any county officer is chosen, the accounts of the various county officers which are supported in whole or in part by public moneys. Such audit shall be made as near the expiration of the term of office as the auditing force of the State Auditor will permit, as determined by the State Auditor.

CONCLUSION

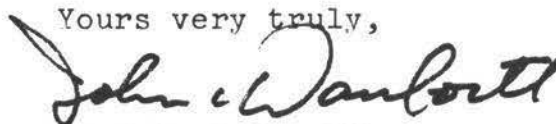
Therefore, it is our opinion:

(1) It is the duty of the State Auditor to audit the accounts of the various county officers, in counties of the third and fourth class, supported in whole or in part by public moneys, at least once during the term for which any county officer is chosen.

(2) The time of making such audit during the term of each county officer shall be as near the expiration of the term of the county officer as the auditing force of the State Auditor will permit, as determined by the State Auditor.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Gene E. Voigts.

Yours very truly,



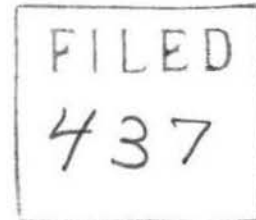
JOHN C. DANFORTH
Attorney General

BANKS:

The designation of the Grandview Bank as a federal depository and financial agent pursuant to federal law to perform functions designated by the Secretary of the Treasury is a matter controlled by federal law and permission to establish this facility is not necessary from the Division of Finance of the State of Missouri. The establishment of this facility, therefore, is dependent upon appropriate decision by the federal authority and the Missouri prohibition against branch banking is not applicable.

OPINION NO. 437

August 31, 1970



Mr. John W. Ridgeway
Deputy Commissioner
Division of Finance
Department of Business
and Administration
12th Floor Jefferson Building
Jefferson City, Missouri 65101

Dear Mr. Ridgeway:

This official opinion is in response to your recent request for a ruling with respect to the facts and questions set forth as follows:

"The Division of Finance is in receipt by the Grandview Bank of Grandview, Missouri, a state bank, for permission to establish and operate a facility on a military reservation at Richards-Gebaur Air Force Base. The Grandview Bank must also seek permission from the appropriate federal agencies to establish this facility. However, should our division authorize the establishment of such a facility in view of the Missouri prohibition against branch banking?"

Although not stated in your opinion request, we assume that the bank in question would operate a facility on the military reservation only after being so designated by the federal government

Mr. John W. Ridgeway

under the terms of Title 12, U.S.C.A., Section 265, which provides in part:

"All insured banks designated for that purpose by the Secretary of the Treasury shall be depositaries of public money of the United States . . . and the Secretary is hereby authorized to deposit public money in such depositaries, under such regulations as may be prescribed by the Secretary; and they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties, as depositaries of public money and financial agents of the Government as may be required of them. . . ."

The Missouri prohibition against branch banking to which you refer in your opinion request is contained in Section 362.105, RSMo 1969, which provides as follows:

"Powers and authority of banks and trust companies.--1. Every bank and trust company created under the laws of this state may:

"(1) . . . provided, however, that no bank or trust company shall maintain in this state a branch bank or trust company, or receive deposits or pay checks except in its own banking house. . . ."

Assuming that the installation contemplated by the Grandview Bank, a state bank, would constitute the establishment of a branch bank under the Missouri law, the question is whether the prohibition against branch banking applies in this situation.

The question has been ruled upon in State of Texas ex rel. Falkner v. National Bank of Commerce of San Antonio, 290 F.2d 229 (5th Cir., Tex., 1961), cert. den. 368 U.S. 832, 7 L.Ed.2d 35, 82 S.Ct. 55 (1961).

There, the State of Texas contended that the Texas prohibition against branch banking prohibited the establishment of a branch of a national bank upon a military reservation. Resolving this question, the court stated:

"For almost two decades, limited banking facilities have been operated at various military installations by national bank-

Mr. John W. Ridgeway

ing associations and by state banks; those facilities have been under the direction of the Secretary of the Treasury and are operated as agents of the federal government. They are designated as depositories and financial agents of the United States under 12 U.S.C.A. §90, if national banks and under 12 U.S.C.A. §265, if banks insured by the Federal Deposit Insurance Corporation. Each bank so designated is authorized to perform only those functions enumerated in the letter granting it authority to act. . . ." loc. cit. 290 F.2d 229, 231.

The court further held that the federal policy as set forth in 12 U.S.C.A., Section 36(c) which provides that national banking association may establish new branches in certain circumstances "subject to the restrictions as to location imposed by the law of the State on State's banks. . . ." does not restrict the power of the appropriate federal agency to establish a facility on a military reservation pursuant to 12 U.S.C.A., Section 90. The court viewed the restrictions with regard to branch banking as not applicable to the provisions permitting the designation of federal depositories or financial agents.

Congressional power to establish depositories and financial agents without regard to the branch banking statutes would extend under 12 U.S.C.A., Section 265 to state banks like the Grandview Bank. In discussing this congressional power the court stated:

"Conceding, as we must, that Congress has the power to determine the conditions under which national banking associations shall operate, the power of Congress to enact such legislation cannot seriously be questioned. The section before us gives the Secretary of the Treasury the power to employ as government financial agents any national banking association, and, having designated a banking association so to act, the Secretary may demand that it perform all such 'reasonable duties' as may be required of it. Clearly this is what the Secretary has done in the present case. . . ." loc. cit. 290 F.2d 229, 233.

In performing the functions designated by the Secretary of the

Mr. John W. Ridgeway

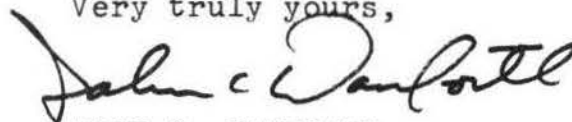
Treasury, the Grandview Bank would be performing a federal function and the federal law as set forth in State of Texas v. National Bank of Commerce of San Antonio, supra, controls.

CONCLUSION

It is therefore the opinion of this office that the designation of the Grandview Bank as a federal depository and financial agent pursuant to federal law to perform functions designated by the Secretary of the Treasury is a matter controlled by federal law and that permission to establish this facility is not necessary from the Division of Finance of the State of Missouri. The establishment of this facility, therefore, is dependent upon appropriate decision by the federal authority and the Missouri prohibition against branch banking is not applicable.

The above opinion, which I hereby approve, was prepared by my Assistant, John C. Craft.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

FIRE PROTECTION
DISTRICTS:
AMBULANCES:

Fire protection districts organized under the provisions of Section 321.510 to Section 321.715, RSMo 1969, continue as legal entities although the statutes under which they were organized have been repealed. Emergency ambulance service provided for under Section 321.225, RSMo 1969, furnished by the district must be furnished for the entire district and not for the portion of the district within one county.

OPINION NO. 438

October 28, 1970



Honorable Melvin Vogelsmeier
State Representative
One Hundred Ninth District
Concordia, Missouri 64020

Dear Representative Vogelsmeier:

This is in response to your request for an opinion from this office concerning fire protection districts in third class counties as follows:

"The fire district in question is one that was organized in 1968 and the area covers parts of three (3) counties.

"No 1 Is such a district having complied with all the requirements RSMo, 1959, is such a district operating legally?

"No 2 Can such a fire district organize an Emergency ambulance service with in one county of the district, under RSMo 1969 chapter 321?"

You state the fire protection district to which you refer was organized in 1968. If so, it was formed under the provisions of Section 321.510 to Section 321.715, RSMo 1969, which applied only to fire protection districts in class two, three and four counties. These sections were repealed by Senate Committee Substitute for House Bill 322, Seventy-fifth General Assembly which amended Section 321.010, RSMo 1969 and other sections so that they would apply to all counties in this state.

You inquire whether a fire protection district organized

Honorable Melvin Vogelsmeier

in 1968 with an area in parts of three counties continues to operate legally. Senate Committee Substitute for House Bill 322 previously referred to herein provides in part:

"Section A. Any fire district already formed or in the process of being formed under the laws of this state on October 13, 1969 shall on the completion of its formation automatically be under all the provisions of chapter 321 RSMo."

This provision as enacted by the legislature has been omitted from the revised statutes. However, its omission from the revised statute does not invalidate such law. Rutledge v. Simpson's Adm'r, 42 S.W. 820, 141 Mo. 290; Langston v. Canterbury, 173 Mo. 122; Granger v. Barber, 236 S.W.2d 293, 361 Mo. 716.

It is the opinion of this office that a fire protection district organized under Section 321.510 to 321.715 RSMo continues as a legal entity even though the statutes under which it was organized have been repealed.

In answer to your second question whether a fire protection district which is composed of areas in three or more counties can organize an emergency ambulance service in one county of the district, it is our opinion that it cannot.

Section 321.225, RSMo provides:

"1. A fire protection district may, in addition to its other powers and duties, provide emergency ambulance service within its district if a majority of the voters voting thereon approve a proposition to furnish such service and to levy a tax not to exceed five cents on the one hundred dollars assessed valuation to be used exclusively to supply funds for the operation of an emergency ambulance service. The district shall exercise the same powers and duties in operating an emergency ambulance service as it does in operating its fire protection service.

"2. The proposition to furnish emergency ambulance service may be submitted by the board of directors at the next annual election of the members of the board or at a special election called for the purpose, or upon petition by five hundred duly qualified electors of such district.

Honorable Melvin Vogelsmeier

A separate ballot containing the question shall read as follows:

Shall the board of directors of _____ Fire Protection District be authorized to provide emergency ambulance service within the district and be authorized to levy a tax not to exceed five cents on the hundred dollars assessed valuation to provide funds for such service?

☐ For emergency ambulance service and the levy

☐ Against emergency ambulance service and the levy

(Place an X in the square opposite the one for which you wish to vote.)

If a majority of the qualified voters casting votes thereon be in favor of emergency ambulance service and the levy, the district shall forthwith commence such service.

"3. As used in this section 'emergency' means a situation resulting from a sudden or unforeseen situation or occurrence that requires immediate action to save life or prevent suffering or disability."

It is our view that in order for a fire protection district to furnish emergency ambulance service under Section 321.225, the question must be submitted to a vote of the qualified voters of the entire district and, if the majority of the voters voting thereon are in favor of the ambulance service and the tax levy as submitted, such service may be furnished by the district. If the ambulance service is provided it must be for the whole district, as such, the same as any other service furnished by the district and not for a portion of the district within one county.

CONCLUSION

It is the opinion of this office that fire protection districts organized under the provisions of Section 321.510 to Section 321.715, RSMo 1969, continue as legal entities although the statutes under which they were organized have been repealed. Emergency ambulance service provided for under Section 321.225,

Honorable Melvin Vogelsmeier

RSMo 1969, furnished by the district must be furnished for the entire district and not for the portion of the district within one county.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being more prominent and the last name "Danforth" written in a more compact, cursive style.

JOHN C. DANFORTH
Attorney General

ELECTIONS: When initiative petitions proposing
INITIATIVE & REFERENDUM: a constitutional amendment are filed
with the Secretary of State and found
to contain insufficient signatures to place the proposition on the
ballot, such petitions cannot be returned to the circulators; and
such petitions, which provided for submission of the proposed amend-
ment at the November 3, 1970 general election or at a special elec-
tion to be called by the Governor, may not be counted toward placing
a proposition on the ballot at a general election or a special elec-
tion to be held after the general election on November 3, 1970.

OPINION NO. 440

November 12, 1970



Honorable James C. Kirkpatrick
Secretary of State
State Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Kirkpatrick:

This opinion is in response to your request for an opinion
on the following questions:

"1. Where petitions seeking to invoke the
power of initiative or referendum have been
presented to the Secretary of State, but found
to contain an insufficient number of signatures,
as required by the constitution, must the Sec-
retary return said petitions to the person or
persons presenting them, or must he retain them
in his possession?

"2. Where petitions seeking to invoke the
power of the initiative set forth a specific
date on which the proposed measure is to be
presented to the people, and sufficient sig-
natures to place the measure on the ballot
are not obtained in time to submit the peti-
tions to the Secretary of State four months
before that election, may the same petitions,
whether submitted to the Secretary of State
originally or not, be counted toward placing
the measure on the ballot at a general elec-
tion two years hence, or at a special election
called by the Governor?"

With respect to your first question, we note that Section
28.040, RSMo 1969, provides:

Honorable James C. Kirkpatrick

"He [Secretary of State] shall keep his office at the seat of government; have the safekeeping of the seal of state and of all public records, including surety bonds, except those for which other provisions are made by law, rolls, documents, acts, resolutions and orders of the general assembly; keep a register of all commissions issued, the official acts of the governor and when necessary, attest the same."

We further note that Section 28.080, RSMo 1969, provides:

"He [Secretary of State] shall not permit any original roll, paper or public document filed in his office to be taken out of it unless called for by a resolution of either or both houses of the general assembly, or for the examination of the chief executive or for publication when required by law."

Section 126.030, RSMo 1969, specifies the procedure by which the Secretary of State accepts initiative petitions. That section reads in part:

". . . When any such initiative or referendum petitions shall be offered for filing, the secretary of state, in the presence of the governor and the person offering the same for filing, shall detach the sheet containing the signatures and affidavits and cause them all to be attached to one or more printed copies of the measure so proposed by initiative or referendum petitions; the detached copies of such measure shall be delivered to the person offering the same for filing. . . ."

We are of the opinion that once the above-mentioned procedure is completed, the petitions are "filed" and that the Secretary of State then must perform his statutory duties with respect to seeing that the proposition is placed on the ballot if he determines that the petition has the required number of signatures. If the petition does not have the required number of signatures, we believe, under the two statutory sections first quoted, that he has no power to return the petitions to the persons presenting petitions.

With respect to your second question, we observe that Article III, Section 50 of the Constitution provides in part:

Honorable James C. Kirkpatrick

" . . . Every such petition shall be filed with the secretary of state not less than four months before the election . . . "

Article XII, Section 2(b) provides in part:

"All amendments proposed . . . by the initiative shall be submitted to the electors for their approval or rejection . . . at the next general election, or at a special election called by the governor prior thereto, . . . "

We understand that the petitions which occasioned this particular inquiry state that the proposition, which the petitioners sought to have submitted to the electorate, was to be voted on at the November 3, 1970 general election or at a special election to be called by the Governor. Under Article XII, Section 2(b), the Governor could only call a special election prior to the general election held on November 3, 1970 to vote on the proposed amendment. Therefore, we interpret the reference to a special election called by the Governor on the petitions to refer to a special election called before November 3, 1970. Consequently, it appears that the signers of the petitions contemplated that the proposition would be submitted to the voters on or before November 3, 1970. Inasmuch as the signers of the petitions, as is evident from the face of the petitions, did not intend to have the proposition submitted any later than November 3, 1970, those petitions are ineffective as petitions proposing a constitutional amendment at some election after the general election held on November 3, 1970.

CONCLUSION

It is the opinion of this office that when initiative petitions proposing a constitutional amendment are filed with the Secretary of State and found to contain insufficient signatures to place the proposition on the ballot, such petitions cannot be returned to the circulators; and such petitions, which provided for submission of the proposed amendment at the November 3, 1970 general election or at a special election to be called by the Governor, may not be counted toward placing a proposition on the ballot at a general election or a special election to be held after the general election on November 3, 1970.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Charles A. Blackmar.

Yours very truly



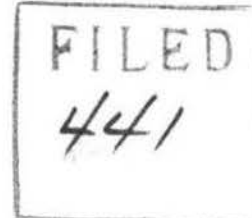
JOHN C. DANFORTH
Attorney General

FOREST CROPLAND:

If the value of the land alone exceeds ten dollars per acre such land may not be classified as forest cropland for tax relief under the State Forestry Law, Chapter 254, RSMo 1969.

OPINION NO. 441

November 4, 1970



Honorable Raymond L. Skaggs
State Representative
District No. 150
P. O. Box 346
Fredericktown, Missouri 63645

Dear Representative Skaggs:

This is in response to your request for an opinion on the question whether land may be classified by the Conservation Commission as forest cropland for partial relief from taxation as provided in the State Forestry Law (Chapter 254, RSMo 1969) if the value of the land alone exceeds ten dollars per acre.

Section 254.080, RSMo 1969, provides that "Any lands . . . classified by the commission as forest croplands as defined in this chapter shall receive partial relief from taxation, as provided in said chapter," However, the authority of the Commission to classify lands as forest croplands is subject to the limitations set forth in paragraphs 1 and 3 of Section 254.040, RSMo 1969, as follows:

"1. Any person desiring to have lands designated as forest croplands shall submit an application therefor to the district forester on form or forms to be provided by the commission. The district forester will make or cause to be made an examination of the lands covered by said application and shall forward a copy of same, together with his recommendations, to the commission. If the commission approve and classify lands as forest croplands they shall be subject to the provisions of this chapter and such rules and regulations.

* * *

"3. No application shall be made for a tract of land containing less than forty acres; and

Honorable Raymond L. Skaggs

no such land shall be classified for tax relief
if the value of the land alone shall exceed ten
dollars per acre."


The foregoing language of Section 254.040 is plain and unambiguous. Therefore, the statute must be given the plain and clear meaning expressed therein. Bunch v. Wagner, 275 S.W.2d 753 (Spr. Ct.App. 1955).

CONCLUSION

It is the opinion of this office that if the value of the land alone exceeds ten dollars per acre such land may not be classified as forest cropland for tax relief under the State Forestry Law, Chapter 254, RSMo 1969.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, L. J. Gardner.

Yours very truly,

A handwritten signature in black ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

Answer by letter-Wood

October 19, 1970

OPINION LETTER NO. 442

Mr. Joseph B. Reichart
Assistant Director of Health
Missouri Division of Health
Broadway State Office Building
Jefferson City, Missouri 65101



Dear Mr. Reichart:

You have requested my opinion on the proper interpretation of the Soft Drink and Beverage Law (Sections 196.365-196.445) with regard to the following questions:

- "1. Must the beverage inspection fee be determined on the gallonage with a maximum established by the 'rated capacity' of the bottling equipment?
- "2. May the 'rated capacity' maximum fee be elected by the bottlers as an alternative method of determining the fee?
- "3. For those companies that export beverages into another state, will we be complying with Section 196.380 if we bill the bottler at three-tenths cent per gallon for that portion sold in Missouri or the maximum fee as determined by the rated capacity, whichever is less?"

The pertinent statutes read as follows:

"A license fee of one dollar shall be paid by each manufacturer of soft drinks or beverages required to be licensed under the provisions of sections 196.365 to 196.445; and in addition thereto an inspection fee shall be paid

Mr. Joseph B. Reichart

by wholesale manufacturers of soft drinks or beverages of three-tenths cent for each gallon of such beverage manufactured or sold in this state, but the fees for inspection shall not exceed four cents per month per case of twenty-four bottles of such manufacturer's bottling capacity, as determined by the rated capacity of the machines therein for an eight hour day as rated by the manufacturer of such machines; . . ." (Emphasis added) (Section 196.375, RSMo)

"All beverages, soft drinks, sirups, flavors or extracts as in sections 196.365 to 196.445 described, which are manufactured, prepared or bottled in this state and exported outside of this state for sale, shall be inspected as other beverages, soft drinks, sirups, flavors or extracts designated in said sections, but such inspection shall be free of cost to the manufacturer or bottler." (Section 196.380, RSMo)

"No such bottled soft drinks or beverages that are manufactured out of the state of Missouri shall be sold or offered for sale within the state unless the same is first inspected and analyzed and approved by the division of health which shall be upon a like application as provided in section 196.365 and a license fee of one dollar shall be paid therefor; and in addition thereto an inspection fee of three-tenths cent for each gallon of such beverages sold in this state by such manufacturer shall be paid by such manufacturer. Like samples for such inspection and analysis shall be furnished as herein provided for Missouri manufacturers. Such license shall be renewed annually upon the same terms and conditions as required for the original license." (Section 196.385, RSMo)

"All manufacturers, wholesalers and dealers in bottling soft drinks, beverages, sirups, flavors or extracts shall keep an accurate account of their sales and make a report under oath at the end of each month to the division

Mr. Joseph B. Reichart

of health with a remittance to cover all sales for the month, unless such manufacturer or bottler pays the maximum inspection fee based on the bottling capacity of such manufacturer's or bottler's plant pursuant to section 196.375. The books of such manufacturers, bottlers, wholesalers or dealers shall at all times be open to examination and inspection by the division of health and its officers and agents." (Section 196.405, RSMo)

"The division of health shall record on books kept for that purpose the names and places of business of all persons, firms and corporations engaged in the manufacture, preparation or bottling of all nonintoxicating beverages or soft drinks or sirups, flavors or extracts as described in section 196.365. The division shall keep a record of all nonintoxicating beverages or soft drinks manufactured, prepared or bottled and the amount produced by each manufacturer or bottler or sold by dealer, or in the case of manufacturers in this state, of the bottling capacity of such manufacturer's plant and shall keep a record of all inspections made. The division shall keep a record of all fees collected and all expenditures incurred and shall make a full and complete report of the same to the governor upon the first day of each year." (Section 196.425, RSMo)

In our opinion, the legislature intended that all soft drinks sold in this state are to be inspected. We further believe that the legislature intended that the fee for such inspection shall be based upon the number of gallons sold in Missouri or the manufacturer's rated bottling capacity. However, the latter basis for the inspection fee, is, as stated by the law, a "maximum inspection fee" (Section 196.405, RSMo) and not an independent basis for computing the inspection fee. This is equally evident from the language of the statute providing for the rated bottling capacity, viz., ". . . but the fees for inspection shall not exceed . . . [the manufacturer's bottling capacity] . . ." (Emphasis added) (Section 196.375, RSMo).

All soft drink manufacturers are required to keep an accurate account of their sales and to make a report each month to the Division of Health of all their sales for the month unless the manufacturer pays the maximum inspection fee based on his bottling capacity (Section 196.405, RSMo). The Division of Health must keep a

Mr. Joseph B. Reichart

record of (1) all soft drinks manufactured or sold in the state or (2) the bottling capacity of each Missouri plant (Section 196.425, RSMo). From these two statutes, we conclude that a given company must report its total sales in Missouri for any particular month, and pay an inspection fee based upon the number of gallons sold, unless the company pays the full fee based upon its plant rated capacity. We can see no justification in these statutes for the company under any circumstances paying a percentage of the inspection fee based upon rated bottling capacity.

We are of the opinion that ample effect is given to the exemption from inspection fee for soft drinks sold outside Missouri (Section 196.380, RSMo) by deducting the out-of-state sales from the total sales reported to the Division of Health each month, and applying the multiplier of three-tenths cent to the gallons sold in Missouri. If the product does not exceed an inspection fee based on the company's rated bottling capacity, then this amount is due. If the product exceeds an inspection fee based on rated capacity, the rated capacity fee is due.

Yours very truly,

JOHN C. DANFORTH
Attorney General

CORONERS:
COUNTY CORONERS:
FEES, COMPENSATION,
AND SALARIES:

A coroner of a second class county is paid an annual salary in lieu of fees and is required to collect on the behalf of the county all fees for official services except such fees as are chargeable to the county.

OPINION NO. 444

August 14, 1970



Honorable Fred W. Meyer
State Representative
104th District
Route #3
Wentzville, Missouri 63385

Dear Representative Meyer:

This opinion is in response to your question concerning whether or not the coroner of St. Charles County can charge and retain fees for official services.

In this respect we call to your attention Section 58.090, RSMo 1969 with respect to second class counties which states:

"In all counties of the second class, the coroner shall receive an annual salary of two thousand six hundred dollars for his services. The salary is in lieu of all fees, charges, emoluments, and money due to, or receivable by the coroner, by virtue of any statute, for services rendered."

In addition, we call to your attention Sections 50.350 and 50.360, RSMo 1969. Section 50.350, RSMo 1969 states:

"1. It shall be the duty of every county officer, in all counties of the second class, who shall be paid an annual salary in lieu of all fees, penalties, commissions, charges, emoluments, and moneys due him or his office for any service performed, to

Honorable Fred W. Meyer

charge, collect and receive, upon behalf of the county, every fee, penalty, commission, charge, emolument and money that accrues in his office for any service rendered, by virtue of any statute of this state, except such fees as are chargeable to the county.

"2. Subsection 1 shall not be construed to prohibit the retention of the commission allowed to the collector in counties having less than one hundred thousand inhabitants for collection of levee and drainage district taxes as provided in section 52.275, RSMo."

Section 50.360, RSMo 1969 states:

"Every such officer shall, at the end of each month, pay over to the county treasury all moneys collected by him from the above sources. He shall take two receipts therefor, and one of such receipts he shall file immediately with the county court. He shall also, at the end of each month, make out an itemized and accurate list of fees, penalties, commissions, charges, emoluments, and moneys accruing in his office for services rendered, which have been collected by him, and one of all fees, penalties, commissions, charges, emoluments, and moneys accruing in his office for services rendered, which have not been collected, giving in both instances the name or names of the person or persons paying or owing the same, and stating, with reference to any money uncollected, that he has been unable, after the exercise of due diligence, to make collection thereof. The aforesaid itemized list shall be signed by the officer and verified by his affidavit, and filed with the county court, and such officer shall be liable on his official bond for all money collected and not accounted for and paid into the county treasury as herein provided. It shall be the duty of the county court to cause any money, shown by the officer's report to be due and unpaid, to be collected by law, and the same, when collected, to be paid into the county treasury."

Honorable Fred W. Meyer

It is therefore clear from the foregoing sections that the coroner of St. Charles County, a second class county, is paid an annual salary in lieu of all fees receivable by him for services rendered and that all such fees due him or his office for services rendered are required to be collected on behalf of the county except such fees as are chargeable to the county.

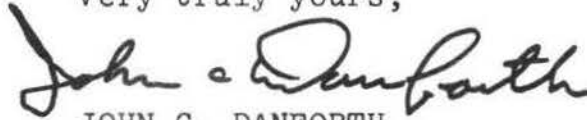
Accordingly, such a coroner is without authority to charge the county for official services.

CONCLUSION

It is, therefore, the opinion of this office that a coroner of a second class county is paid an annual salary in lieu of fees and is required to collect on the behalf of the county all fees for official services except such fees as are chargeable to the county. Accordingly, such a coroner is without authority to charge the county for official services.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Klaffenbach.

Very truly yours,


JOHN C. DANFORTH
Attorney General

STATE AUDITOR:
COUNTY OFFICERS:

The State Auditor must audit the account of each county officer, supported in whole or in part by public moneys, at least once during the term of each such officer. Thus, the accounts of an officer chosen for a two year term must be audited at least once every two years and the accounts of an officer chosen for a four year term must be audited at least once every four years. Such audit shall be made as near the expiration of the term of the officer as the auditing force of the State Auditor will permit.

OPINION NO. 445

September 16, 1970

Honorable John T. Russell
State Representative
District No. 125
P. O. Box 93
Lebanon, Missouri 65536



Dear Representative Russell:

This is in response to your request for an official opinion of this office with respect to the following inquiry:

" . . . Must the audit be performed every two years, every four years or within some other stated period of time by the State Auditor's Office?"

Your inquiry specifically refers to Opinion of the Attorney General, No. 434, Russell, August 3, 1970, which held that it is the duty of the State Auditor to audit the accounts of the various county officers, in counties of the third and fourth class, supported in whole or in part by public moneys, at least once during the term for which any county officer is chosen. That opinion further held that the time of making such audit during the term of each county officer shall be as near the expiration of the term of the county officer as the auditing force of the State Auditor will permit, as determined by the State Auditor.

Your opinion request involves determination as to the frequency of audits of third and fourth class counties pursuant to

Honorable John T. Russell

Section 29.230, RSMo 1969. That section provides, in part, as follows:

"1. In every county which does not elect a county auditor, the state auditor shall audit, without cost to the county, at least once during the term for which any county officer is chosen, the accounts of the various county officers supported in whole or in part by public moneys. The audit shall be made as near the expiration of the term of office as the auditing force of the state auditor will permit."

Counties of the third and fourth class do not elect a county auditor. Thus, Section 29.230(1), RSMo 1969, requires the State Auditor to audit the accounts of the various third and fourth class county officers supported in whole or in part by public moneys.

Three possible constructions may be accorded to this statutory requirement. (1) The accounts of all county officers supported in whole or in part by public moneys shall be audited every two years, since at least one of the county officers supported in whole or in part by public moneys is chosen for a two year term. (2) That the accounts of county officers supported in whole or in part by public moneys shall be audited every four years, since some county officers supported in whole or in part by public moneys are chosen for a four year term. (3) That the State Auditor must audit the account of each county officer supported in whole or in part by public moneys at least once during the term of each such officer. Thus, an officer selected for a two year term must be audited once every two years and an officer serving a four year term must be audited at least once every four years.

We conclude the latter construction is the appropriate construction of this statutory provision and, therefore, the State Auditor must audit the account of each county officer, supported in whole or in part by public moneys, at least once during the term of each officer. Thus, an officer selected for a two year term must be audited once every two years and an officer serving a four year term must be audited at least once every four years.

In reaching this conclusion, it has been necessary to resolve two issues. First, since the frequency of the audit is governed by the phrase "at least once during the term for which any county officer is chosen," it is necessary to determine the

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meaning of the word "any". Second, whether the audit provided for by Section 29.230(1), RSMo 1969, requires the audit of all county officers within a county, who are supported in whole or in part by public moneys to be made at the same time or whether the audit is with reference to the account of each county officer.

Considering the first issue, the meaning to be subscribed to the phrase "at least once during the term for which any county officer is chosen," and in particular the meaning of the word "any," we have been guided by Section 1.090, RSMo 1969, which provides:

"Words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import."

This statutory provision is consistent with rules of construction which have been applied by the courts. In *State v. Hawks*, 360 Mo. 490, 228 S.W.2d 785, 788 (1950), it was stated:

". . . Since no technical language is employed in the statute, the words used 'will be construed in their ordinary sense and with the meaning commonly attributed to them, unless such construction will defeat the manifest intent of the Legislature.' . . ."

The word "any" has been commonly construed to be all comprehensive and synonymous with the words "each", "every" and "all". *State ex rel. Randolph County v. Walden*, 357 Mo. 167, 206 S.W.2d 979, 983 (1947); *State v. Hawks*, *supra*; *Wormington v. City of Monett*, 356 Mo. 875, 204 S.W.2d 264, 267 (1947); *Hime v. City of Galveston*, 268 S.W.2d 543, 545 (Ct. Civil App., Tex., 1954); *People v. Delgrado*, 146 N.Y.S.2d 350, 355 (1955); *Reed v. Reed*, 332 P.2d 1049, 1052 (Or., 1958); *In re Belefski's Estate*, 196 A.2d 850, 855 (Pa., 1964); *Motor Cargo v. Board of Township Trustees*, 117 N.E.2d 224, 227 (Ct. C.P., Ohio, 1953).

Substituting the synonym "each" for "any," Section 29.230(1), RSMo 1969, requires the State Auditor to audit the accounts of the various third and fourth class county officers supported in whole or in part by public moneys at least once during the term for which each county officer is chosen. Said section further directs that the audit shall be made as near the expiration of the

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term of office as the auditing force of the State Auditor will permit.

In determining which of the three possible constructions to be accorded to this statutory provision will promote ". . . 'its plain and rational meaning and promote its manifest purpose.'" State v. Hawks, supra, at 788, it is necessary to consider whether the provision requires the audit of the accounts of all the various county officers, within a county, who are supported in whole or in part by public moneys to be made at the same time or whether such audits may be made at different times. In this respect, it is helpful to compare the language employed in subsections (1) and (2) of Section 29.230, RSMo 1969. Subsection (1) provides:

"In every county which does not elect a county auditor, the state auditor shall audit, without cost to the county, at least once during the term for which any county officer is chosen, the accounts of the various county officers supported in whole or in part by public moneys. The audit shall be made as near the expiration of the term of office as the auditing force of the state auditor will permit."

Subsection (2) provides:

"The state auditor shall audit any political subdivision of the state, including counties having a county auditor, if requested to do so by a petition signed by five percent of the qualified voters of the political subdivision determined on the basis of the votes cast for the office of governor in the last election held prior to the filing of the petition. The political subdivision shall pay the actual cost of audit. No political subdivision shall be audited by petition more than once in any one calendar or fiscal year."

Subsection (1) provides for audits on the basis of the various county officers while subsection (2) provides for an audit on a political subdivision basis. This office held in Opinion of the Attorney General, No. 57, Warden, June 18, 1968, that the accounts of a county treasurer of a second class county cannot be singled

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out for audit under Section 29.230(2), RSMo 1969. The holding of that opinion and the language of subsection (2) compels us to conclude that the audit provided for by subsection (2) is an audit of all the accounts of the county. Comparison of the language used in subsection (1) with that used in subsection (2), compels us to conclude that the audit provided for in subsection (1) is an audit of each individual county officer who is supported in whole or in part by public moneys.

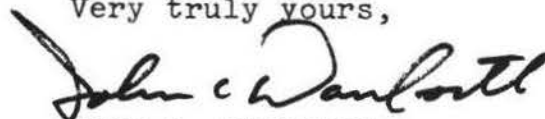
In reaching this conclusion, we are not unmindful of the provisions of Section 516.130, RSMo 1969, which provides that in certain cases an action against a public officer, upon a liability incurred by the doing of an act in his official capacity and in virtue of his office or by the omission of an official duty, including the nonpayment of money collected upon an execution or otherwise, is barred unless commenced within three years. Notwithstanding, our opinion must be based upon the legal requirements imposed upon the State Auditor by the statutory provision here involved, and not on policy considerations.

CONCLUSION

Therefore, it is the opinion of this office that the State Auditor must audit the account of each county officer, supported in whole or in part by public moneys, at least once during the term of each such officer. Thus, the accounts of an officer chosen for a two year term must be audited at least once every two years and the accounts of an officer chosen for a four year term must be audited at least once every four years. Such audit shall be made as near the expiration of the term of the officer as the auditing force of the State Auditor will permit.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Gene E. Voigts.

Very truly yours,



JOHN C. DANFORTH
Attorney General

SCHOOLS: School Board can call repeated
ELECTIONS: elections to increase school
TAXATION (SCHOOLS): tax levy. Board can issue state-
ments giving information as to
necessity of tax increase. Board must open and operate schools
even though it has insufficient funds to operate for nine month
period.

OPINION NO. 446

September 4, 1970



Honorable Harold J. Esser
State Representative
District No. 18
3 West Glen Arbor Road
Kansas City, Missouri 64114

Dear Representative Esser:

This official opinion is issued in response to your request concerning the following questions:

- "1. Is it legal for a School Board to state publicly that the schools will not open until the prescribed levy is passed, and that there will be a levy election every 17 days until it passes?
- "2. Can the School Board repeatedly submit a levy which requires two-thirds majority without reducing it, stating that they will submit the same levy every 17 days until it is passed?"

Article X, Section 11(b) of the Missouri Constitution limits the tax rate which school districts may impose without voter approval. Such section reads as follows:

"For school districts formed of cities and towns, including the school district of the city of St. Louis--one dollar and twenty-five cents on the hundred dollars assessed valuation;

"For all other school districts--sixty-five cents on the hundred dollars assessed valuation."

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In order for a school district to increase the tax above the limited rate, reference must be made to Article X, Section 11(c) of the Missouri Constitution which provides as follows:

"In all municipalities, counties and school districts the rates of taxation as herein limited may be increased for their respective purposes for not to exceed four years, when the rate and purpose of the increase are submitted to a vote and two-thirds of the qualified electors voting thereon shall vote therefor; provided in school districts the rate of taxation as herein limited may be increased for school purposes so that the total levy shall not exceed three times the limit herein specified and not to exceed one year, when the rate period of levy and the purpose of the increase are submitted to a vote and a majority of the qualified electors voting thereon shall vote therefor; provided in school districts in cities of seventy-five thousand inhabitants are over the rate of taxation as herein limited may be increased for school purposes so that the total levy shall not exceed three times the limit herein specified and not to exceed two years, when the rate period of levy and the purpose of the increase are submitted to a vote and a majority of the qualified electors voting thereon shall vote therefor, provided, that the rates herein fixed, and the amounts by which they may be increased, may be further limited by law; and provided further, that any county or other political subdivision, when authorized by law and within the limits fixed by law, may levy a rate of taxation on all property subject to its taxing powers in excess of the rates herein limited, for library, hospital, public health, recreation grounds and museum purposes."

Section 164.021, RSMo 1969, implements the provisions of Section 11(c) and provides, in part, as follows:

"1. Whenever it becomes necessary, in the judgment of the school board of any school district in the state, to increase the annual rate of taxation beyond the rate authorized by the constitution for district purposes without

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voter approval, or when the voters of the district equal in number to ten percent or more of the number of votes cast for the member of the school board receiving the greater number of votes cast at the last school election in the district petition the board, in writing, for such an increase of the rate, the board shall determine the rate of taxation necessary to be levied in excess of the authorized rate, and the purpose or purposes for which the increase is required, specifying separately the rate of increase required for each purpose, and the number of years, not in excess of four, for which each proposed excess rate is to be effective. The proposal may provide for a greater rate of increase in one or more years than in others and acceptance of a proposal to increase the tax levy for any year or years shall not prevent the board from subsequently proposing a further increase in the tax levy for the same year or years.

"2. The board shall submit the proposition as to whether the rate of taxation shall be increased as proposed by the board to the voters of the district at the annual school meeting or the annual or biennial election for members of the board, or at a special meeting or election called and held for that purpose at the usual place or places of holding elections for members of the board, except that in metropolitan districts the proposal may be submitted only at a special election ordered by the board."
(Emphasis added)

It is apparent that Section 164.021 leaves to the discretion of the school board of any school district in this state the decision to submit a proposition to increase the rate of taxation above the limited rate to popular vote. Said section specifically authorizes the school board to call a special election at which it may submit a proposition to increase the rate of taxation.

Section 162.061, RSMo 1969, prescribes the manner in which a school board shall call such a special election, and provides as follows:

"Unless otherwise prescribed by this law notice of any special election or meeting in

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any school district or of any proposal to be voted on at an annual election or meeting, when required by law, shall be in writing and shall be given either by posting written notices in at least five public places within the district at least fifteen days before the meeting or election, or by publishing the notice in a newspaper within the county in which all or part of the district is located which has general circulation within the district, once a week for two consecutive weeks, the first publication to be at least fifteen days before and the last publication to be at least seven days before the date of the election or meeting. The method of giving notice shall be determined by the school board of the district by an order entered on the records of the district. Each notice shall contain a brief statement of the questions or proposals to be voted on at the election or meeting."

Subject to the restriction of fifteen days notice, there is no limitation as to the number of times a school board may hold a special election concerning an increase in taxation above the limited rate, or to the resubmission of a proposition to increase taxes above the limited rate after defeat of the same proposition at a former election.

In this respect Section 164.021, supra, differs from Section 162.441, RSMo 1969, which provides that after holding a special election for annexation, a school board shall not call a subsequent special election for a period of two years. In a former opinion of this office issued to Honorable Eugene S. Heitman, dated March 21, 1958, we concluded that because the only restriction regarding elections to change the boundary lines between six-director school districts pursuant to Section 165.294 RSMo 1969, was that the election be had at the time of the annual school election, there was no limitation upon the number of times an election to change boundary lines could be called and voted upon. A copy of that opinion is enclosed.

Although Missouri courts have not had an occasion to consider the precise issue in question, the Supreme Court of New Jersey, construing a statutory provision similar to Section 164.021, has held that in the absence of specific prohibition a school board may call a special election for the reconsideration of a tax increase proposal previously rejected. State v. Board of Education, 53 A. 236 (N.J. 1902). Courts in other jurisdictions have held

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that in the absence of specific statutory prohibition, successive elections may be called and held at the discretion of the district officer on a school bond proposition after defeat of the same proposition at an earlier election. Luzader v. Sargeant, 4 Wash. 299, 30 P. 142 (1892); Taylor v. Brownfield, 4 Iowa 264 (1875); Molette v. Board of Education of Van Lear Graded Dist., 260 Ky. 737, 86 S.W.2d 990 (1935).

Therefore, we conclude that special elections may be called and held every seventeen days in the discretion of a school board concerning a proposal to increase the rate of taxation above the limited rate after defeat of the same proposition at an early election, without reducing the amount of the proposed increase.

You also inquire whether a school board may state that its schools will not open until the proposed tax levy is passed. The inquiry presents two questions: First, whether the board may issue statements with respect to a proposed tax levy; and, second, whether it may refuse to open its schools if such tax levy is not approved, which would result in insufficient funds to operate the schools for a nine month term.

With respect to the first issue, this office has previously determined that a school board has authority to expend public funds to provide voters with relevant facts concerning school bond elections. Opinion of the Attorney General, No. 186, dated July 1, 1969, issued to the Honorable John J. Johnson. Also considered in that opinion was a publication of the school board, the propriety of which was tested by whether it went "... beyond the discretion of the school authorities in promoting a bond issue which they consider essential in the discharge of the duty of 'establishing and maintaining free public schools.'" Those principles are applicable to the instant inquiry and compel the conclusion that the school authorities did not exceed their discretion in the issuance of the questioned statement, subject to the limitations necessarily implied in our consideration of the second issue.

The second issue necessarily included in your inquiry is whether a school board may close its schools for lack of operating funds. For reasons hereafter set forth, we conclude that a school board has authority to close its schools because of lack of operating funds. This conclusion necessitates a further inquiry, if the school board is authorized to close its schools due to insufficient operating funds, may it refuse to open its schools if the operating funds are inadequate to provide for a nine month term. In such a situation, there are two alternative actions which may be taken by the school board. First, it may refuse to open the schools within its district only if it has arranged for all pupils

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within the district to be educated in another district. If such arrangements are not or cannot be made, then it must open and operate its schools until all financial resources are exhausted.

Advancement of reasons supporting the stated conclusions begins by reference to the strong commitment made by this State to the concept of free public schools as succinctly stated in the Constitution:

"A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this state within ages not in excess of twenty-one years as prescribed by law. . . ." Constitution of Missouri, 1945, Article IX, Section 1(a).

In furtherance of this stated commitment, the Constitution provided for funding of free public schools. Article IX, Section 3(b), Constitution of Missouri, 1945, provides:

"In event the public school fund provided and set apart by law for the support of free public schools, shall be insufficient to sustain free schools at least eight months in every year in each school district of the state, the general assembly may provide for such deficiency; but in no case shall there be set apart less than twenty-five per cent of the state revenue, exclusive of interest and sinking fund, to be applied annually to the support of the free public schools."

The Constitution further made provision for local taxes to supplement state funds. Article X, Section 11(b), Constitution of Missouri, 1945, provides:

"Any tax imposed upon such property by municipalities, counties or school districts, for their respective purposes, shall not exceed the following annual rates:

* * *

"For school districts formed of cities and towns, including the school district of the city of St. Louis--one dollar and twenty-five cents on the hundred dollars assessed valuation;

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"For all other school districts--sixty-five cents on the hundred dollars assessed valuation."

The Constitution provides for certain tax rate increases only upon approval by popular vote. Article X, Section 11(c), provides:

"In all municipalities, counties and school districts the rates of taxation as herein limited may be increased for their respective purposes for not to exceed four years, when the rate and purpose of the increase are submitted to a vote and two-thirds of the qualified electors voting thereon shall vote therefor; provided in school districts the rate of taxation as herein limited may be increased for school purposes so that the total levy shall not exceed three times the limit herein specified and not to exceed one year, when the rate period of levy and the purpose of the increase are submitted to a vote and a majority of the qualified electors voting thereon shall vote therefor; provided in school districts in cities of seventy-five thousand inhabitants or over the rate of taxation as herein limited may be increased for school purposes so that the total levy shall not exceed three times the limit herein specified and not to exceed two years, when the rate period of levy and the purpose of the increase are submitted to a vote and a majority of the qualified electors voting thereon shall vote therefor; provided, that the rates herein fixed, and the amounts by which they may be increased, may be further limited by law; and provided further, that any county or other political subdivision, when authorized by law and within the limits fixed by law, may levy a rate of taxation on all property subject to its taxing powers in excess of the rates herein limited, for library, hospital, public health, recreation grounds and museum purposes."

These provisions are relevant to our analysis in that it is apparent that a school district receives substantial funds (without voter approval) even though the funds may be increased when certain levies are submitted for voter approval.

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Section 160.021, RSMo 1969, provides that school districts shall be divided into four classes; namely, common, six-director, urban and metropolitan school districts. Consolidated School District No. 1, Hickman Mills, Missouri, is organized as a six-director school district under the provisions of Section 162.101 through 162.451, RSMo 1969. Section 162.261, RSMo 1969, invests the government and control of Consolidated School District No. 1 in its school director board. Section 162.331, RSMo 1969, delineates the duties and liabilities of the board of a six-director school district. Said section prescribes that the duties of a board of a six-director school district shall be the same as the duties of the board of a common school district. Section 162.811, RSMo 1969, sets forth the duties of the board of a common school district, and provides as follows:

"The board shall visit the schools under their care, examine into their condition and the progress of the pupils, advise and consult with the teachers, and exercise such supervision as will best promote the interests of the schools."

The directors are sworn to faithfully discharge their duties according to law. Section 162.781, RSMo 1969.

The discharge of their duties, according to law, may, upon occasion, confront them with duties which are in conflict. A duty imposed by Section 171.031, RSMo 1969, is that:

"Each school board shall prepare annually a calendar for the school term, specifying the opening date and providing a minimum term of at least nine months or one hundred seventy-four days of actual pupil attendance. The term may be extended to ten months when the resources of the school funds justify the extension."

Assuming that the school district is without sufficient funds to provide for a minimum term of nine months, the school board is then confronted with the duty of providing for such a term and at the same time complying with Article VI, Section 26(a), Constitution of Missouri, 1945, which provides:

"No county, city, incorporated town or village, school district or other political corporation or subdivision of the state shall become indebted in an amount exceeding in any year the income and revenue provided for such year plus any unencumbered

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balances from previous years, except as otherwise provided in this Constitution."

This prohibition regarding deficit spending is reenforced by the provisions of Section 165.021, RSMo 1969, which provides, in part, as follows:

"4. No warrant shall be drawn from the payment of any school district indebtedness unless there is sufficient money in the treasury and in the proper fund for the payment of the indebtedness.

* * *

"6. No county, township or school district treasurer shall honor any warrant against any school district that is in excess of the income and revenue of the school district for the school year beginning on the first day of July and ending on the thirtieth day of June following."

The authorization granted to certain school districts to issue tax anticipation notes does not authorize deficit spending. Section 165.131, RSMo 1969, provides, in part, as follows:

"The school board of any urban school district in this state, upon a vote of a majority of the members of the board, may borrow funds for the use of the various funds of the district, including the debt service fund, and may issue negotiable notes in evidence thereof, payable out of the revenues derived from school taxes, for the purposes of the funds of any year in which the notes shall be placed to the credit of the respective funds for the use and benefit of which the borrowing was made, as evidenced by the notes, and subject to the right to make transfers from and to funds as otherwise permitted by law, the proceeds of the notes shall be used and expended only in payment of the expenses and obligations properly payable from the funds respectively, and incurred or to be incurred against the funds during the year for the expenses of the year, or in payment of principal and interest on the notes. . . ."

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The school board is limited in its expenditures to those in which there is sufficient money in the treasury and in the proper fund for payment of the indebtedness and which is not in excess of the income and revenue of the school district for the school year. Therefore, if the school board lacks sufficient operating funds to provide for a nine month term, it is authorized to close the schools, when the funds are exhausted.

Our conclusion is supported by cases decided in other jurisdictions. In City of Louisville v. Greer, 166 Miss. 554, 148 So. 356 (1933), the court stated that schools should be closed whenever the revenues are insufficient for further maintenance.

In Morley v. Power, 10 Lea 219, 78 Tenn. 219 (1882), the court stated:

" . . . The terms of the school are necessarily dependent upon the amount of these funds. It was certainly never contemplated that the schools should be run beyond the amount of funds provided for their support. . . . It would be plainly their duty to keep the schools open as long as the funds would justify, but no longer. . . ." 78 Tenn. at 224.

The Constitution and statutes of this State implicitly recognize that situations may arise in which the school district lacks funds to provide for the minimum term of nine months. Such recognition is found in those provisions which attach certain penalties to the failure to provide a minimum term of nine months. For example, Article XI, Section 2, Constitution of Missouri, 1875, provided:

"The income of all the funds provided by the state for the support of free public schools shall be paid annually to the several county treasurers, to be disbursed according to law; but no school district, in which a free public school has not been maintained at least three months during the year for which the distribution is made, shall be entitled to receive any portion of such funds."

That section was incorporated, in part, in Article IX, Section 3(a), Constitution of Missouri, 1945, which provides:

"All appropriations by the state for the support of free public schools and the income from the public school fund shall be

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paid at least annually and distributed according to law."

Omitted from the present Constitution is the prohibition with respect to distribution of funds to a school district which failed to maintain a free public school for the specified time period. The reason for this is stated in the Constitutional Debates:

"MR. LINDSAY: . . . We have left out the penalty in this Section which provides that a school district must maintain a school for three months during the year in order to share in the state's distribution of funds. The General Assembly, many years ago, provided by law that school districts must maintain a school for eight months of the year, so this language has been obsolete for many years and serves no useful purpose any longer. . . ." Constitutional Debates, 1945, page 2605.

The penalty is now contained in Section 163.021(1), RSMo 1969, which provides:

"A school district shall receive state aid for its educational program only if it:

(1) Operates its schools for a minimum of one hundred eighty days including legal school holidays as defined in section 171.051, RSMo, and days when the school is dismissed by order of the board to permit teachers to attend teachers' meetings;"

Statutory recognition that a school term may be shortened by necessity is found in Section 163.051, RSMo 1969, which provides:

"The state board of education, in the apportionment of the state school moneys fund, may use the number of days' attendance for the next full year preceding, in apportioning money to districts which have been forced to close their schools before the expiration of the full term, because of nonpayment of taxes as a result of flood and drouth condition, or because of a loss of surplus funds occasioned by failures of banks in any county of this state."

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Another instance of statutory recognition that a school term may be shortened by necessity or otherwise is found in Section 162.081, RSMo 1969, which provides:

"Whenever any school district in this state fails or refuses in any school year to provide for a nine months' school term if a levy of sixty-five cents on the one hundred dollars' valuation, together with the public funds and cash on hand, will enable it to have so long a term, its corporate organization shall lapse and the territory theretofore embraced within the lapsed district shall be unorganized territory, and the same, or any portion thereof, may be attached to any adjoining district for school purposes, in the manner provided by section 162.071; but no school district shall lapse where provision is lawfully made for the attendance of the pupils of the district at another school or where the failure to make the needed provision for the nine months of school results from irregular or void proceedings had for that purpose."

Therefore, we conclude that a school board may shorten the school term when the funds provided for are inadequate to sustain a nine month term. However, a school board may not refuse to open its schools unless it makes appropriate arrangements for the education of its pupils in some other district. If such arrangements are not or cannot be made, then the school board must open and operate its schools for a term which will end when the funds are exhausted.

The stated position is supported by State ex inf. McAllister v. Consolidated School Dist. No. 2 of Platte County, 204 S.W. 1098 (Mo. banc 1918). Section 162.081, RSMo 1969, provides that the remedy which attaches to the failure of a school board to provide for a school term of a specified duration is the forfeiture of the district's authority and its subsequent consolidation with another district. Such was the relief sought in State ex inf. McAllister v. Consolidated School Dist. No. 2 of Platte County, supra. That case was a proceeding in the nature of quo warranto by the State on the relation of Frank W. McAllister, Attorney General, against Consolidated School District No. 2 of Platte County, Missouri. In the Spring of 1914, Consolidated School District No. 2 of Platte County was organized over a territory theretofore embracing several school districts. The incorporated

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school districts challenged the validity of the consolidation but were unsuccessful as the organization of the consolidated district was upheld in State ex inf. Barker v. Smith, 271 Mo. 168, 196 S.W. 17 (1917).

Thereafter, an action was instituted to forfeit the franchise of the consolidated school district because of its failure to provide for an eight months' school.

The action was based upon Section 10776, RSMo 1909, which provided:

"Whenever any school district in this state, now organized or that may be hereafter organized under the laws of this state, shall fail or refuse, for the period of one year, to provide for an eight months' school in such year, provided a levy of forty cents on the one hundred dollars' valuation, together with the public funds and cash on hand, will enable them to have so long a term, the same shall be deemed to have lapsed as a corporate body, and the territory theretofore embraced within such lapsed district shall be deemed and taken as unorganized territory, . . ."

The evidence demonstrated that until the court's determination in State ex inf. Barker v. Smith, supra, the county clerk uniformly extended the taxes for the benefit of the original school districts and that such proceeds were not turned over to the consolidated district. However, the evidence also demonstrated that the consolidated district maintained a high school in one of the old districts where a school was maintained prior to the organization of the consolidated school district. Thereafter, the present action was instituted. The court refused to forfeit the corporate rights of the consolidated school district and stated thusly:

"It will be seen at a glance that the above provision for forfeiture is wholly inapplicable unless it shall be shown by the evidence that the funds in the hands of the school district, together with the levy of 40 cents on the \$100 valuation, are sufficient for the maintenance of an eight months' school in one year. There is no substantial evidence in the present record to that effect; for, until the final decision of this court validating the organization of respondent, it did not receive the public funds and cash on hand belonging to the former school district

to which it was entitled. . . . This fact, in connection with the evidence showing an appropriation of such funds, and also intervening revenues from taxation belonging to respondent, by the officers and directors of the old school districts, thereby preventing respondent from the direct handling of such funds for the payment of teachers employed by it and compelling it, in order to maintain schools, in many instances, to employ the teachers selected by the old districts and to acquiesce in the payment of their salaries by the directors of the former school districts, are sufficient to exclude respondent from the purview of the statute in question, which shows on its face and by its terms that it was only intended to affix a forfeiture for failure to provide an eight months' school in one year, when such omission did not result from inability 'to have so long a term,' or where the failure was purposeful or intentional on the part of the school district.

"A thorough review of the testimony in this case satisfies us of the entire good faith of respondent in the exercise, as far as possible, of all its corporate franchises. It did maintain a high school in one of the districts, and seems to have maintained also, as far as possible, schools in other localities where they had been theretofore maintained, through the medium of a payment of the salaries of teachers out of the revenues that were improperly in the hands of the directors of the former school districts. In these circumstances, the statute relied upon by relator is wholly inapplicable, for giving that statute its full scope and effect, as was done in the case of State ex rel. v. Claxton, 263 Mo. 701, 173 S.W. 1049, it does not appear in the present case, as it did appear in that case, that the 40-cent levy and the public funds and cash on hand provided a fund sufficient to maintain a school for eight months in one year. In that case, the sufficiency of the revenues of the school district was shown by an express agreement. In the present case, the record does not show that the 'public funds and cash

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on hand' belonging to the former school district has ever been turned over to respondent, nor its ability, without such funds, to have independently paid all of the teachers employed by it. Under the authority of that case and the facts of the present one, therefore, the statute invoked by relator has no application whatever to the present record." (Emphasis added.)

Morley v. Power, supra, was an action by a school teacher to recover under the terms of his contract. The contract had been entered into with the teacher for one year beginning on August 16, 1880, in which he was to be compensated the sum of \$60 per month for his services. On March 18, 1881, the board of directors voted to close all schools because of a lack of funds and all schools were closed except for the one taught by Morley. The board refused to pay for his services past the date of closing of the schools. One of the defenses raised was the school board's authority to discontinue school. Although there was no positive provision as to the length of the term of a school year, in that case, the directors did have the duty to use school funds in a manner as would promote the interests of the public schools. The court, commenting upon the authority and duties of the directors, stated:

" . . . It would be plainly their duty to keep the schools open as long as the funds would justify, but no longer. . . ."

Nor was a school board authorized to close its schools for a year in order to comply with the requirements of a statute which provided that schools operating on the calendar year basis shall so adjust their finances as to operate on a fiscal year basis and to be out of debt for current expenses by a certain date. The court's view was that the action of the school board was premature and unauthorized in that the necessity for such action was not yet at hand. State v. Rapides Parish School Board, 158 La. 249, 103 So. 757 (1925).

CONCLUSION

Therefore, it is the opinion of this office that:

(1) A school board of a six-director school district has the discretionary power to call and hold a special election every 17 days concerning a proposition to increase taxes above the rate which can be levied without voter approval even though the same proposition has been defeated at a previous election.

Honorable Harold J. Esser

(2) A school board has authority to issue statements with respect to a proposed tax levy increase which they consider essential in the discharge of their duty to establish and maintain free public schools.

(3) If all available funds are insufficient to provide for a full nine month term, the school board may refuse to open the schools within its district if it has arranged for all pupils within the district to be educated in another district. If such arrangements are not or cannot be made, then the school board must open and operate its schools until all financial resources are exhausted. When all financial resources have been exhausted, the school board is authorized to close its schools.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being more prominent.

JOHN C. DANFORTH
Attorney General

Enclosures:

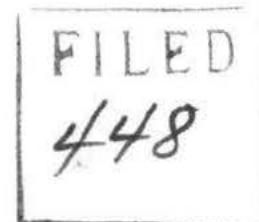
Opinion No. 38, 3/21/58, Heitman
Opinion No. 186, 7/1/69, Johnson

(Answer by Letter - Klaffenbach)

August 17, 1970

OPINION LETTER NO. 448

Honorable James L. Paul
Prosecuting Attorney
McDonald County
Pineville, Missouri 64656



Dear Mr. Paul:

This letter is in response to your opinion request in which you inquire concerning whether the county court of a third class county may establish speed limits on a county road for the reason that the road is heavily traveled and by reason of its design is considered to be hazardous.

We are enclosing a copy of our Opinion No. 315 dated September 24, 1969 to Senator Johnson which is self-explanatory. The provision of the senate bill referred to in that opinion is now found in Section 304.351, subsection 7 RS to 1969.

An examination of the statutes indicate that such a county court has no authority to establish speed limits because of the conditions indicated in your inquiry.

Very truly yours,

JOHN C. SANFORTH
Attorney General

DIRECTOR OF REVENUE:
PURCHASING AGENT:

The Director of Revenue has authority under Section 32.050, RSMo 1969, to enter into a contract with a private corporation under which contract employees of the corporation key punch data necessary for income tax refunds. Any such contract must be awarded by the State Purchasing Agent in accordance with Section 34.030, RSMo 1969. The furnishing of information obtained from income tax returns to such corporate employees would not violate the provisions of Section 143.270, RSMo 1969, which provides that the contents of state income tax returns shall be confidential. The persons performing the key punching services would be subject to the statutory prohibitions against divulging information obtained by income tax returns.

December 1, 1970

OPINION NO. 450

Honorable James E. Schaffner
Director of Revenue
Department of Revenue
Jefferson Building
Jefferson City, Missouri 65101



Dear Mr. Schaffner:

This official opinion is rendered pursuant to the request contained in your letter concerning the entering into a contract with a corporation under which the corporation furnishes employees who key punch data necessary for income tax refunds.

More specifically the question is whether the Director has authority to contract with a corporation for key punching of information necessary to make income tax refunds under circumstances where the persons performing the services would be under an oath of secrecy and supervised by regular personnel of the Department.

It is our understanding that the only function to be performed by the employees of the private corporation would be the transferring of information from tax returns to machines so that the information can be utilized by a computer. Employees of the Department of Revenue would supervise and control this operation.

Authority to enter into such a contract is provided by Section 32.050(2), RSMo 1969, where it is stated as follows:

"Powers and duties of director.--1. The director of revenue shall:

*

*

*

Honorable James E. Schaffner

"(2) Procure, either through, the purchasing agent, or by other means authorized by law, supplies, material, equipment or contractual services for the department of revenue and for each division in the department;"

There are no statutory provisions for the Director of Revenue to procure contractual services except through the State Purchasing Agent. Section 34.010.1 and .4 provide as follows:

"1. 'Contractual services' shall include all telephone, telegraph, postal, electric light and power service, and water, towel and soap service.

*

*

*

"4. The term 'supplies' used in this chapter shall be deemed to mean supplies, materials, equipment, contractual services and any and all articles or things, except as in this chapter otherwise provided."

Section 34.040 provides in part as follows:

"The purchasing agent shall purchase all supplies for all departments of the state, except as in this chapter otherwise provided. * * * "

Although the Director of Revenue through the State Purchasing Agent may have the power to enter into such a contract, those provisions of the Missouri Income Tax statute making it unlawful to divulge information relating to income tax returns filed under the law must be considered.

Section 143.270, RSMo 1969, states as follows:

"Officers not to divulge information--exceptions--penalty--1. It shall be unlawful for any person, persons or officers to divulge, give out or impart to any other person, or persons, any information relative to, or the contents of any income tax return filed under this chapter, or to permit any other person or persons not connected with his office to see, inspect or examine the same; but it shall be lawful for any person or officer to use any income tax return filed under this chapter for the purpose of assessing intangible personal property." (Emphasis supplied)

It is observed that regular personnel of the Department of Revenue will supervise and control the key punch operators with respect to the performance of their work. Under these circumstances it is our view that such operators would be persons connected with the

Honorable James E. Schaffner

office of Director of Revenue within the meaning of Section 143.270(1) while engaged in transferring income tax information from taxpayers' returns to key punch cards. Accordingly, the furnishing of income tax information by the Director to these operators would not be prohibited.

Section 143.270(1) states:

"It shall be unlawful for any person, * * *
to divulge, give out or impart to any other
person, or persons, any information relative
to, or the contents of any income tax return
* * * "

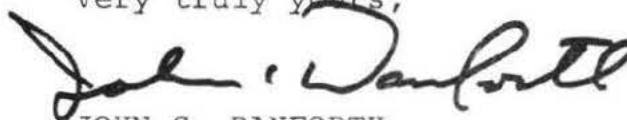
In view of this statutory language it is our further opinion that the persons performing the key punching services in question would be subject to the prohibition against divulging information gained from such income tax returns.

CONCLUSION

It is the opinion of this office that the Director of Revenue has authority under Section 32.050, RSMo 1969, to enter into a contract with a private corporation under which contract employees of the corporation key punch data necessary for income tax refunds. Any such contract must be awarded by the State Purchasing Agent in accordance with Section 34.030, RSMo 1969. The furnishing of information obtained from income tax returns to such corporate employees would not violate the provisions of Section 143.270, RSMo 1969, which provides that the contents of state income tax returns shall be confidential. The persons performing the key punching services would be subject to the statutory prohibitions against divulging information obtained by income tax returns.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John E. Park.

Very truly yours,



JOHN C. DANFORTH
Attorney General

ELECTIONS:
POLL BOOKS:
PUBLIC RECORDS:

A person inspecting a poll book as provided in Section 111.581, RSMo 1969, may make photostatic copies of the list of voters in the poll books.

OPINION NO. 451

September 4, 1970

Honorable Harold W. Barrick
Prosecuting Attorney
Ralls County
P. O. Box 276
New London, Missouri 63459



Dear Mr. Barrick:

This letter is in response to your request for an opinion of this office in which you request:

"Is it permissible for a citizen to obtain photostatic copies of the lists of voters from the poll books after the official canvass of an election is completed?"

Section 111.521, RSMo 1969, requires the keeping of poll books by the judges and clerks of election, and sets forth the form which said poll books are to take. Consistent with Section 111.581(1), RSMo 1969, one poll book from each election district or precinct is to be made available for public inspection. Such section provides in part as follows:

"1. The election commissioners, or county clerk, upon the receipt of a ballot box and key thereto, or a sack or container containing ballots cast at the election shall note the condition of seal or stamp on the box or container and enter a statement of its condition upon a book kept for this purpose together with the name of the judge who received ballot box, and the name of the judge who returned the key. The election commissioners or the county clerk, shall thereupon open the ballot box and other containers, remove the poll books containing the returns of the votes cast, and note upon the books their condition, and put them together with the voted ballots in a secure place, under lock and key, except that one of the poll

Honorable Harold W. Barrick

books from each election district or precinct
shall be available for public inspection."
(Emphasis added)

In light of the fact that Section 111.581(1), RSMo 1969, makes available for public inspection a poll book from each election district or precinct, Section 109.190, RSMo 1969, becomes relevant. By that section, any record for which a public inspection may be had may be photographed:

"In all cases where the public or any person interested has a right to inspect or take extracts or make copies from any public records, instruments or documents, any person has the right of access to the records, documents or instruments for the purpose of making photographs of them while in the possession, custody and control of the lawful custodian thereof or his authorized deputy. . . ."

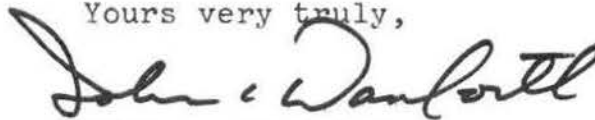
From the foregoing, it is the conclusion of this office that a person inspecting a poll book consistent with Section 111.581, RSMo 1969, may make photostatic copies of the list of voters in the poll books.

CONCLUSION

It is, therefore, the conclusion of this office that a person inspecting a poll book as provided in Section 111.581, RSMo 1969, may make photostatic copies of the list of voters in the poll books.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Kenneth Romines.

Yours very truly,



JOHN C. DANFORTH
Attorney General

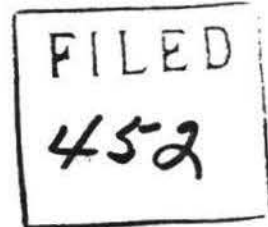
STATE PURCHASING AGENT:

The Purchasing Agent is required to determine whether bids for supplies to be purchased by the State of Missouri show that the delivered price of a firm, corporation or individual not doing business as a Missouri firm, corporation or individual is the same or less than the bid of a Missouri firm, corporation or individual and if he determines that a Missouri bidder has submitted an equal bid, in competition with an out-of-state bidder, then the Purchasing Agent is required to prefer the Missouri bidder. The Purchasing Agent is not permitted to accept a higher bid from a Missouri bidder on the grounds that the economic interests of the state would be furthered by patronizing a bidder doing business as a Missouri firm, corporation or individual.

OPINION NO. 452

December 9, 1970

Honorable George E. Murray
State Representative
38th District
3 Williamsburg Road
Creve Coeur, Missouri 63141



Dear Representative Murray:

This is in response to your opinion request requesting an official opinion from this office with regard to the following question:

" . . . I would specifically request an opinion as to whether or not the present statutes would permit the purchasing agent to prescribe regulations, giving preference to Missouri products and Missouri firms where the bid price is inconsequential and the benefit to the state and its inhabitants outweighs other factors. I further request your opinion as to what is meant by the preferences described in Sections 34.060 and 34.070."

Honorable George E. Murray

April 19, 1950, this office issued an official opinion, No. 17 to Leo J. Clavin, the State Purchasing Agent.

On page 5 of the opinion, the predecessor to Section 34.070 was discussed as follows:

"In answer to this question we suggest that the language of the statute clearly indicates an intention on the part of the Legislature that where the subject matter of the purchase can be purchased from a firm, corporation or individual doing business as a Missouri firm, corporation or individual at approximately the same price as such subject matter may be purchased from a firm, corporation, or individual not doing business as a Missouri firm, corporation or individual and the quality is approximately the same the purchasing agent shall purchase the thing, or things, desired from the firm, corporation or individual doing business as a Missouri firm, corporation or individual. This being true it becomes the duty of the purchasing agent to determine the question and the discretion is vested in him to decide as to how wide a variation there can be between the respective prices and qualities of the goods offered without its being true that the prices and qualities are not approximately the same. When he has determined that question his determination is final and if he has determined that both price and quality are approximately the same he is vested with the further discretion to determine, and it is his duty to determine, whether or not either person, firm, corporation or individual offering to sell is a person, firm, corporation or individual not doing business as a Missouri firm, corporation or individual. . . ."

Section 34.070, RSMo 1969, now provides that the Purchasing Agent shall give preferences in the circumstances there set forth:

Honorable George E. Murray

" . . .[W]hen quality is equal or better and delivered price is the same or less."

This language results from a 1965 amendment to 34.070 and prior to that amendment, Section 34.070 provided:

" . . .[W]hen quality and price are approximately the same. . . ."

It is apparent that the legislature in withdrawing the term "approximately" has limited the discretion of the Purchasing Agent. The opinion to Clavin, dated April 19, 1950 is hereby withdrawn because of the amendment of Section 34.070. The Purchasing Agent now has the duty to determine if two bids are the same rather than approximately the same. The preference section applies only where the Purchasing Agent determines that two bids are the same and after such a determination, directed to prefer a Missouri bidder. If he determines that one of two bids is lower, he is not permitted to accept the higher bid.

We note that you refer to that portion of Section 34.040 which provides that the "contracts shall be let to the lowest and best bidder".

We do not believe that "best bidder" is to be interpreted as modifying Section 34.070 in the sense that the Purchasing Agent is to make a determination as to whether the purchase of a particular product from a Missouri firm would be in the economic interest of the state. 81 C.J.S. States §116. The specific preference section is limited to the situation where the price is the same or less and we do not believe that the Purchasing Agent is authorized to consider the economic consequences to the state by determining that a Missouri citizen would be a "best bidder".

CONCLUSION

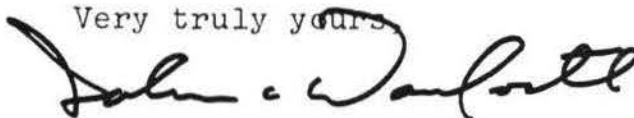
It is therefore the opinion of this office that the Purchasing Agent is required to determine whether bids for supplies to be purchased by the State of Missouri show that the delivered price of a firm, corporation or individual not doing business as a Missouri firm, corporation or individual is the same or less than the bid of a Missouri firm, corporation or individual and if he determines that a Missouri bidder has submitted an equal bid, in competition with an out-of-state bidder, then the Purchasing Agent is required to prefer the Missouri bidder. The

Honorable George E. Murray

Purchasing Agent is not permitted to accept a higher bid from a Missouri bidder on the grounds that the economic interests of the state would be furthered by patronizing a bidder doing business as a Missouri firm, corporation or individual.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Craft.

Very truly yours

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

JOHN C. DANFORTH
Attorney General

Answer by letter-Wieler

October 30, 1970

OPINION LETTER NO. 453



Mr. Robert L. Hyder, Chief Counsel
Missouri State Highway Commission
Jefferson City, Missouri 65101

Dear Mr. Hyder:

This is in response to your request for an opinion from this office concerning the applicability of this state's traffic laws to roads constructed and maintained by the United States in the national forests. Specifically, you have asked the following question:

- "1. Does the Highway Patrol, a local sheriff, or other peace officer have jurisdiction over offenses committed on roads open to the public but situated on land owned in fee by the United States and which said road was constructed and is maintained solely by the United States, . . ."

It is our understanding that the roads involved are known as forest development roads, and are being developed and operated by the Forest Service for the protection, administration, and utilization of the national forests in this state. These roads are constructed and maintained by the United States pursuant to the regulations set forth in Chapter 2, Title 36 of the Code of Federal Regulations. These roads are open to the public, but the Forest Service maintains the right to control or regulate their use, including closing if necessary, to accomplish their primary purpose, that of forest development. The Forest Service takes the position that traffic on these roads is subject to state traffic laws where applicable, except to the extent deemed necessary to prescribe rules in addition thereto or in conflict therewith to accomplish the purposes involved. See 36 C.F.R., Section 212.7, et seq.

Mr. Robert L. Hyder

It is clear that the establishment of national forests did not serve to deprive this state of jurisdiction over the lands involved. See Attorney General's Opinion No. 9 issued to Governor Blair on March 6, 1957, and Attorney General's Opinion No. 71 issued to the Honorable George J. Pruneau on April 23, 1969 (copies enclosed). The crucial question then is whether Missouri statutes defining traffic offenses are broad enough to cover acts committed on forest development roads.

Section 301.010(9), RSMo 1969, defines the term "highway" as it is used in Chapter 301 dealing with the licensing of vehicles and as used in Sections 304.010 to 304.040 and 304.120 to 304.570, RSMo 1969, dealing with traffic regulations, as follows:

"(9) 'Highway', any public thoroughfare for vehicles, including state roads, county roads and public streets, avenues, boulevards, parkways or alleys in any municipality;"

Section 304.025, sub. 1, RSMo 1969, defines the term "highway" as it is used in Sections 304.014 to 304.026, RSMo 1969, dealing with traffic regulations, as follows:

"1. The word 'highway' whenever used in sections 304.014 to 304.026 shall mean any public road or thoroughfare for vehicles, including state roads, county roads and public streets, avenues, boulevards, parkways or alleys in any municipality."

Section 302.010(7), RSMo 1969, defines the term "highway" as it is used in Chapter 302, dealing with the licensing of drivers, as follows:

"(7) 'Highway', any public thoroughfare for vehicles, including state roads, county roads and public streets, avenues, boulevards, parkways, or alleys in any municipality;"

The central theme of all these definitions is exactly the same, i.e., a "highway" is any thoroughfare for vehicular traffic used by the public. In construing the term "highway" where it had been defined by the legislature as "any public thoroughfare for vehicles, including state roads, county roads and public streets, avenues, boulevards, parkways or alleys in any municipality," the Missouri Supreme Court has said:

"The evident purpose of the Legislature in enacting this statute was to protect the lives

Mr. Robert L. Hyder

and property of persons while on or using the roads of this state where the public are accustomed to travel. It would be giving the statute a strained and narrow construction to hold that the Legislature did not intend to protect the lives and property of persons on or using a highway continuously traveled by the public generally, unless such highway had been legally established by constituted authority or by user for the statutory period of time. Keeping in mind the purpose of the statute, it is reasonable to conclude that the word 'highways' was used in the statute in its popular rather than its technical sense, and was intended to include all highways traveled by the public, regardless of their legal status. . . ." (Phillips v. Henson, 326 Mo. 282, 30 S.W.2d 1065, 1068 (1930))

Even though the Forest Service has reserved the right to restrict the use of these roads by the public under certain circumstances, it is our opinion that they constitute "highways" of this state, as defined in the above-mentioned statutes, inasmuch as they are open to the public generally and are roads whereon the public are accustomed to travel.

Therefore, the highway patrol, a local sheriff, or other peace officers would have jurisdiction over traffic offenses committed on forest development roads open to the public but situated on land owned in fee by the United States and constructed and maintained solely by the United States.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 9
3-6-57, Blair

Op. No. 71
4-23-69, Pruneau

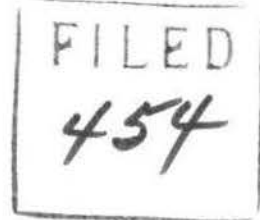
CONSTITUTIONAL LAW:
CONSTITUTIONAL AMENDMENT:

The effective date of the Judicial Reform Amendment, Senate Joint Resolution No. 16, 75th General Assembly, is January 1, 1972.

OPINION NO. 454

September 11, 1970

Honorable James C. Kirkpatrick
Secretary of State
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Kirkpatrick:

This is in response to your request for an opinion as to the effective date of Senate Joint Resolution No. 16, passed by the 75th General Assembly and more popularly known as the Judicial Reform Amendment, which was submitted to the people as a constitutional amendment on August 4, 1970, and subsequently adopted.

In your letter, you pointed out the possible conflict between the Missouri Constitution and Section 31.1 of Senate Joint Resolution No. 16. Article XII, Section 2(b) of the Constitution provides that constitutional amendments shall take effect at the end of thirty days after the election adopting them. Section 31.1 of Senate Joint Resolution No. 16, 75th General Assembly, provides:

"The effective date of this amendment shall be January 1, 1972. If at its submission, the provisions of this amendment are favorably adopted by the qualified voters, during the period from such adoption and until the effective date hereunder, the general assembly may enact such laws and make such appropriations as may be necessary to give effect to its provisions. The supreme court may promulgate rules as authorized by this article prior to the effective date of the amendment."

In resolving this apparent conflict, we note the following language in State ex rel. Board of Fund Commissioners v. Holman, 296 S.W.2d 482, 491 (Mo. En Banc 1956), which is as follows:

". . . And of course 'a clause in a constitutional amendment will prevail over a provision of the constitution or earlier amendment inconsistent therewith, since an amendment to the constitution becomes a part of the fundamental law, and its operation and effect cannot be limited or controlled by previous constitutions or laws that may be in conflict with

Honorable James C. Kirkpatrick

it.' 16 C.J.S., Constitutional Law, § 26, p.
99; State ex rel. Lashly v. Becker, 290 Mo.
560, 235 S.W. 1017, 1020."

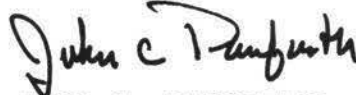
Therefore, it is our opinion that the amendment adopted by the people on August 4, 1970, takes precedence over Article XII, Section 2(b) of the Missouri Constitution, thereby making the effective date of the Judicial Reform Amendment January 1, 1972.

CONCLUSION

The effective date of the Judicial Reform Amendment, Senate Joint Resolution No. 16, 75th General Assembly, is January 1, 1972.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Richard L. Wieler.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" and last name "Danforth" clearly distinguishable.

JOHN C. DANFORTH
Attorney General

missed

PLANNING
COMMISSION

Answer by letter-Klaffenbach

OPINION LETTER NO. 455

August 21, 1970

Honorable G. William Weier
Prosecuting Attorney
Jefferson County Court House
Hillsboro, Missouri 63050

Dear Mr. Weier:

This letter is in response to your opinion request in which you ask the following:

"Jefferson County, a second class county, adopted planning and zoning in 1962 under Sections 64.510 through 64.690. Since the adoption, a Planning Commission was appointed under 64.540, subdivision regulations were adopted under 64.580 and zoning regulations were adopted on July 30, 1970, under 64.640. Said regulations were not to be enforced until 90 days from the 30th day of July 1970 and neither an officer, nor a court of adjustment has been appointed under 64.650 and 64.660.

"On August 4, a special election was held, along with the primary election in Jefferson County, under Section 64.885 of the Revised Statutes and Sections 64.800 through 64.905 were adopted in place of Sections 64.510 through 64.690. Thus, the alternate planning and zoning was enacted to replace planning and zoning under 64.510 through 64.690. Under 64.905, the Statute states that the alternate plan should be effective in the county and the County Planning and Zoning shall be conducted thereafter

Honorable G. William Weier

as provided in the alternate plan, rather than as provided in Section 64.510 to 64.690.

"The questions that we have are: 1. Under 64.905 is the County Court required to appoint a new Planning Commission, or does such Planning Commission continue as is, but under the alternate planning and zoning sections? 2. Will it be necessary for the County Court to readopt both subdivision regulations and zoning regulations under the procedure set out in 64.800 through 64.905, or do these regulations continue to be enforceable under the new sections?"

We note that the alternate planning and zoning was adopted under the provisions of Section 64.885, RSMo 1969, and that under said provisions if the majority of the votes cast is in favor of county zoning and planning, the county court is required to proceed with a program of county planning and zoning as provided in Sections 64.800 to 64.840 and 64.845 to 64.880, RSMo 1969.

Further, as you indicate, Section 64.905, RSMo 1969, provides:

"1. The provisions of sections 64.800 to 64.905 are established as an alternative to the provisions of sections 64.510 to 64.690.

"2. If the voters of any second or third class county adopt county planning or zoning under the provisions of sections 64.800 to 64.905 after having previously adopted county planning or zoning under the provisions of sections 64.510 to 64.690, the provisions of sections 64.800 to 64.905 shall be effective in the county and the county planning or zoning shall be conducted thereafter as provided in sections 64.800 to 64.905 rather than as provided in sections 64.510 to 64.690."

While we find no decided cases on the precise questions you pose, it is our view that, under these circumstances, the provisions of Sections 64.800 to 64.905, RSMo 1969, are effective and supersede the provisions of Sections 64.510 to 64.690, RSMo 1969. As a result the Planning Commission appointed pursuant to the sections which were superseded has no authority to continue to

Honorable G. William Weier

act under the adopted alternative plan. Further, it is our view that the regulations adopted under the prior plan which were to be effective on a date later than the date of the adoption of county planning and zoning under Sections 64.800 to 64.905, RSMo 1969, have no effect after the adoption of the alternative plan and all regulations must be made pursuant to the provisions of the alternative plan.

Very truly yours,

JOHN C. DANFORTH
Attorney General

MOTOR VEHICLES:
STATE UNIVERSITY:
ROADS AND BRIDGES:

The County Court of St. Charles County does not have the authority to set speed limits on county roads not within the limits of any incorporated city, town or village, lower than that provided in Section 304.010, RSMo 1969, for the reason that St. Charles County, although a second class county, does not have a population of 125,000 residents and the extension centers located in that county do not constitute a "state university" within the meaning of Section 304.010 5., RSMo 1969.

OPINION NO. 456

October 14, 1970

Honorable Fred W. Meyer
State Representative
One Hundred Fourth District
Route No. 3
Wentzville, Missouri 63385



Dear Representative Meyer:

This is in reply to your request for an opinion concerning the question of whether the county court of St. Charles County has the authority pursuant to Section 304.010 5., RSMo 1969, to set speed limits on county roads outside of incorporated cities, towns or villages.

Section 304.010 5. provides as follows:

"5. The county court of any county of the second class containing one hundred twenty-five thousand or more inhabitants or a county of the second class containing a state university may set a speed limit on any county road not within the limits of any incorporated city, town or village, lower than that otherwise provided in this section where the condition of the road or nature of the area requires a lower speed. The court shall cause copies of any order establishing a speed limit on a county road

Honorable Fred W. Meyer

to be sent to the chief engineer of the state highway department and the superintendent of the state highway patrol. After the roads have been properly marked by signs indicating the speed limits set by the county court, the speed limits shall be effective as those provided in this section."

In your opinion request you advise that the 1970 Census indicates that St. Charles County has a population of about 92,000. Therefore, the only basis upon which the county court of St. Charles County would have the authority to set speed limits on county roads outside of incorporated cities, towns or villages, is to qualify as "a county of the second class containing a state university."

You provided us with a letter addressed to you from an individual indicating his belief that St. Charles County, a second class county, is a "county of the second class containing a state university" within the meaning of Section 304.010 5., RSMo 1969, for the reason that the following extension centers of the University of Missouri are located in St. Charles County:

- (a) University of Missouri Agricultural Experimental Station, Soil Experimental Farm,
- (b) University of Missouri -- Columbia, Weldon Spring Research Center,
- (c) University of Missouri Extension Division, St. Charles County.

Whether the extension centers located in St. Charles County, either singly or together, constitute a "state university" for purposes of Section 304.010 5., RSMo 1969, depends upon the legislative intent of that statute. We believe that the purpose of the statute is to authorize a county court to set speed limits on county roads not within the limits of any incorporated city, town or village where a relatively large number of residents in the county would give rise to congested residential and traffic conditions. As one remedy for the traffic problems created by such congestion, the court court would be empowered to set limits where the condition of the road or nature of the area would require a lower speed. The legislature did not, however, consider that conditions would become congested enough to warrant a grant of such authority to a county court until the county attained a population of 125,000 residents. The only exception to this county population requirement is where the county contains a "state university". The legislature apparently believed that

Honorable Fred W. Meyer

the presence of a "state university" in a second class county would create traffic conditions which necessitated the granting of power to the county court to set speed limits in the unincorporated areas of the county.

The term "state university" has a precise and definite meaning in this state. Sections 9(a) and 9(b), Article IX of the Constitution of Missouri provide for one and only one "state university":

"Section 9(a). State university--government by board of curators--number and appointment. --The government of the State University shall be vested in a board of curators consisting of nine members appointed by the governor, by and with the advice and consent of the senate."

"Section 9(b). Maintenance of state university and other educational institutions.-- The general assembly shall adequately maintain the State University and such other educational institutions as it may deem necessary."

Chapter 172, RSMo 1969, entitled "State University", deals with various aspects of that institution. Section 172.010, RSMo 1969, provides that "A university is hereby instituted in this state, the government whereof shall be vested in a board of curators."

Although the State of Missouri has only one "state university", it has four campuses, located at Columbia, Rolla, Kansas City and St. Louis.

For the above reasons, it is the opinion of this office that an extension center of the University of Missouri does not constitute a "state university" as that term is used in Section 304.010 5., RSMo 1969. Furthermore, because we are concerned with the characteristics of the institution rather than the number of institutions in any one county, the fact that St. Charles County contains three extension centers, does not affect this conclusion.

Therefore, because St. Charles County has neither a population of 125,000 residents nor a "state university" within the meaning of Section 304.010 5., RSMo 1969, the county court of that county does not have the authority, under Section 304.010 5., RSMo 1969, to set speed limits on county roads not within the limits of any incorporated city, town or village.

Honorable Fred W. Meyer

CONCLUSION

The County Court of St. Charles County does not have the authority to set speed limits on county roads not within the limits of any incorporated city, town or village, lower than that provided in Section 304.010, RSMo 1969, for the reason that St. Charles County, although a second class county, does not have a population of 125,000 residents and the extension centers located in that county do not constitute a "state university" within the meaning of Section 304.010 5., RSMo 1969.

The foregoing opinion, which I hereby approve, was prepared by my Assistants, J. Michael Jarrard and D. Brook Bartlett.

Very truly yours,

A handwritten signature in black ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" being more prominent.

JOHN C. DANFORTH
Attorney General

Answer by letter-Wood

September 17, 1970

OPINION LETTER NO. 458

Honorable Charles S. Broomfield
State Representative
District No. 87
4801 No. Lister
Kansas City, Missouri 64119



Dear Representative Broomfield:

You asked for an opinion on whether the following situation constitutes a violation of the conflict of interest statutes, Section 105.450 to 105.495, RSMo 1969. An employee of the Gas Service Company which is the only supplier of natural gas for North Kansas City, has been appointed to the hospital board of that city (Section 96.150, RSMo, et seq.). The person is in a supervisory position with the Gas Service Company for an area that does not include North Kansas City and the hospital, and he does not have any direct control through his employment with Gas Service Company over the North Kansas City area and the Municipal Hospital. You suggest, however, that as a member of the hospital board he could be influential in determining whether the hospital would continue to use natural gas at present or increased levels, instead of some other source of power, in the event of an expansion of the present facility. You also pointed out that the person is employed by a public utility, which is regulated by the Public Service Commission, and asked whether this might affect the applicability of the conflict of interest statutes.

Section 105.490, RSMo 1969, which covers the situation in question, reads as follows:

"1. No officer or employee of an agency shall transact any business in his official capacity with any business entity of which he is an officer, agent or member or in which he owns a

Honorable Charles S. Broomfield

substantial interest; nor shall he make any personal investments in any enterprise which will create a substantial conflict between his private interest and the public interest; nor shall he or any firm or business entity of which he is an officer, agent or member, or the owner of substantial interest, sell any goods or services to any business entity which is licensed by or regulated in any manner by the agency in which the officer or employee serves.

"2. Any person who violates the provisions of this section shall be adjudged guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than five hundred dollars or by confinement for not more than one year, or both."

While it might appear, because of its title, that Section 105.490, RSMo 1969, applies only to "state" officers, this office has held that a member of a hospital board "comes within the prohibitions of the conflict of interest statutes." (Section 105.450, RSMo, et seq.). See Attorney General Opinion No. 321, White, August 4, 1969. Since you state that the individual in question holds an executive or supervisory position with the Gas Service Company, we think it safe to assume that he is either an "officer, agent, or member" thereof, or that he "owns a substantial interest" therein.* The question now becomes whether the hospital board member is in a position to "transact any business" with the Gas Service Company. This office has repeatedly held that the power to "transact business" is present if the person has discretionary rather than ministerial duties. See Attorney General Opinion No. 282, Turner, June 28, 1966, Attorney General Opinion No. 196, David, June 13, 1967, and Attorney General Opinion No. 428, Lawson, December 1, 1966.

The board of the Municipal Hospital is required to:

*"'Substantial interest', ownership by the individual, or his spouse, directly or indirectly, of ten percent or more of any business entity, or of an interest having a value of ten thousand dollars or more, or the receipt by an individual or his spouse of a salary, gratuity, or other compensation or remuneration of six thousand dollars, or more, per year from any individual, partnership, organization, or association;" (Section 105.450(4), RSMo)

Honorable Charles S. Broomfield

" . . . control the expenditures of all moneys collected to the credit of the fund established for such facility and the construction, leasing, equipping, operating and maintaining of the facility and the grounds . . ." (Section 96.190, RSMo)

The board would be required to make a decision on the purchase of natural gas for the facility and thereby, in our opinion, "transact business" with the supplier of natural gas.

This brings up a further question. Has any particular board member violated the statute until he actually participates in a decision on the use of natural gas? We believe he has. Attorney General Opinion No. 188, Downs, September 3, 1968, held that an alderman who was also an officer and director of the city depository was in violation of Section 105.490, RSMo 1959, even though the board of alderman had not made a decision regarding the selection of the depository since the passage of the conflict of interest statutes in 1967. The opinion held the board of alderman had to exercise continuing judgment with respect to depository contracts and, therefore, the alderman who was an officer of the city depository was in violation of the statute. We believe the hospital board has a continuing judgment with respect to the public utility contract, and therefore, the board member who is an employee or officer of the Gas Service Company is in violation of Section 105.490, RSMo 1969.

The fact that the Gas Service Company is regulated by the Public Service Commission is, in our opinion, of no significance.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 321
8-4-69, White *Withdrawn*

Op. No. 282
6-28-66, Turner *Withdrawn*

Op. No. 196
6-13-67, David *Withdrawn*

Op. No. 428
12-1-66, Lawson *Withdrawn*

Op. No. 188
9-3-68, Downs *Withdrawn*

Answer by letter- Wood

OPINION LETTER NO. 458A

Honorable Charles S. Broomfield
State Representative
District No. 87
4801 North Lister
Kansas City, Missouri 64119



Dear Representative Broomfield:

Mr. Richard Watson has written us requesting a reconsideration of our Opinion Letter No. 458 issued to you on September 17, 1970.

In Opinion Letter No. 458 we concluded that the hospital board has a continuing judgment with respect to its utility contract, and therefore, a board member who is an employee or officer of the Gas Service Company is in violation of Section 105.490, RSMo.

Mr. Watson has advanced the additional information that the board member in question is not in an executive or supervisory capacity with the Gas Service Company but is rather a sales representative for a district of the Gas Company totally separate from the district where the hospital is located. We do not feel that this information would alter the conclusions stated in Opinion Letter No. 458. Even though this employee of the Gas Service Company is not in an executive or supervisory position, he would still be an "agent or member" or a person having a "substantial interest" in the company and therefore would be subject to the prohibition of Section 105.490.

Mr. Watson further states that once the natural gas burning equipment is installed in the hospital, the hospital board of trustees thereafter has no discretion (i.e., "transacts [no] business") in regard to procuring natural gas from the Gas Service Company, since the company is a regulated utility (Chapter 393, RSMo) and is the sole provider of natural gas for that area at rates that are not subject to negotiation between the company and the hospital.

Honorable Charles S. Broomfield

We fail to see the relevancy of the fact that the gas rates are set by law. A continuing obligation that a member of the board of trustees has is to determine whether the use of natural gas shall be continued, discontinued or supplemented by other fuels.

Yours very truly,

JOHN C. DANFORTH
Attorney General

(Answer by Letter) Klaffenbach

OPINION LETTER NO. 459

August 21, 1970



Honorable Carl D. Gum
Prosecuting Attorney
Cass County Court House
Harrisonville, Missouri 64701

Dear Mr. Gum:

This letter is in response to your opinion request asking:

"Can the governing body of a township
convey property owned by the township
for no consideration or nominal con-
sideration to an existing fire district?"

We are enclosing herewith our Opinion No. 42 dated August 19, 1948, to Mr. Marvin C. Hopper in which we held that a county court does not have the power to give a bridge on an abandoned county highway to a special road district in another county, or to sell such a bridge to such road district for a nominal consideration.

We believe that the same principle applies in this instance and as a result it is our view that a township, although a corporate body, does not have the power to convey real property to a fire protection district for no consideration or for a nominal consideration.

We note, however, that the powers of such townships are set out in Section 65.260, RSMo 1969, and Subsection (4) thereof states that each township shall have power and capacity:

"To make such orders for the disposition,
regulation or use of its corporate property
as may be conducive to the interest of the
inhabitants thereof; . . ."

Honorable Carl D. Gum

In our Opinion No. 11 dated May 29, 1963, to Mr. J. W. Colley, copy enclosed, we construed this subsection and concluded that it authorized the sale of a township nursing home to the county if such disposition is conducive to the interest of the inhabitants of the townships.

Although the quoted provisions of Subsection (4) indicate that the consideration need not be in a monetary form we nevertheless find no authority to permit a conveyance for no consideration or for a nominal consideration.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosures:

Op. No. 42
8-19-48, Hopper

Op. No. 11
5-29-63, Colley

ELECTIONS:
BALLOTS:

Section 111.591, RSMo 1969, does not authorize the prosecuting attorney or other public officer to inspect ballots in the custody of the county clerk or board of election commissioners, unless some judicial proceeding, grand jury investigation, or other investigation authorized by law is pending.

OPINION NO. 461

September 15, 1970

Honorable G. William Weier
Prosecuting Attorney
Jefferson County Court House
Post Office Box 246
Hillsboro, Missouri 63050



Dear Mr. Weier:

This official opinion is issued in response to your recent letter, in which you advise us that there was a discrepancy between the number of ballots shown on the poll sheets and the number of ballots tallied in a recent election and ask whether the custodian of the ballots may permit an inspection of these ballots, in the absence of any pending civil or criminal litigation or grand jury proceeding.

The statutory authority for inspection of ballots is contained in Section 111.591, RSMo 1969. This provision establishes the county clerk or board of election commissioners as official custodian of ballots following the election. Such section provides in part as follows:

"All ballots, after being counted, shall be sealed up in a package and delivered to the county clerk or board of election commissioners who shall deposit them in their offices, where they shall be safely preserved for twelve months and shall not allow them to be inspected except in case of contested elections, investigations, or in the trial of all civil or criminal cases in which a violation of any law relating to elections, including

Honorable G. William Weier

primary elections, is under investigation or at issue, and then only on the order of the proper court, or a judge thereof in vacation, and under such restrictions for their safekeeping and return as the court or judge making the same deems necessary. . . ."

This statutory provision must be read in the light of the language of Article VIII, Section 3 of the Constitution of Missouri, which reads as follows:

"All elections by the people shall be by ballot or by any mechanical method prescribed by law. Every ballot voted shall be numbered in the order received and its number recorded by the election officers on the list of voters opposite the name of the voter. All election officers shall be sworn or affirmed not to disclose how any voter voted: Provided, that in cases of contested elections, grand jury investigations and in the trial of all civil or criminal cases in which the violation of any law relating to elections, including nominating elections, is under investigation or at issue, such officers may be required to testify and the ballots cast may be opened, examined, counted, compared with the list of voters and received as evidence.

Essentially identical provisions of the Constitution of 1875 were construed in the case of State ex rel Hollman v. McElhinney, 315 Mo. 731, 286 S.W. 951 (1926), in which the Supreme Court of Missouri held that provisions for inspection of ballots which went beyond the authority specified in the above-quoted constitutional provision were invalid.

We are of the opinion that the provision for inspection of ballots in the case of "investigations" as set out in Section 111.591 must be construed as applying only to grand jury investigations, or other investigations in the course of judicial proceedings. Such a construction would harmonize the statutory provisions with those of Article VIII, Section 3 of the state constitution, which refers expressly to "grand jury investigations".

Honorable G. William Weier

Such a harmonizing construction should be employed if possible. Mobil Oil Corp. v. Danforth, 455 S.W.2d 505 (Mo. 1970). The McElhinney case cited above indicates, furthermore, that the policy behind Article VIII, Section 3 is to guard the access to ballots following elections and to forbid inspection except under the circumstance expressly set out.

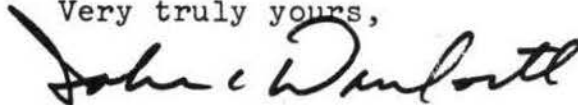
It follows that an informal inspection by public officials is not authorized by the statute.

CONCLUSION

The custodian of ballots following an election cannot permit an inspection by the prosecuting attorney or other public officers, under the authority of Section 111.591, RSMo 1969, in the absence of any pending grand jury investigation or judicial proceeding.

The foregoing opinion, which I hereby approve, was prepared by my Special Assistant, Charles B. Blackmar.

Very truly yours,

A handwritten signature in black ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

Answer by Letter (Klaffenbach)

OPINION LETTER NO. 463

August 21, 1970

Honorable G. William Weier
Prosecuting Attorney
Jefferson County Court House
P. O. Box 246
Hillsboro, Missouri 63050



Dear Mr. Weier:

This letter is in response to your request for an opinion in which you ask whether Section 72.130, RSMo 1969, is in violation of the provisions of Section 15, Article VI of the Missouri Constitution.

Section 72.130 provides as follows:

"No city, town or village shall be organized within any county of the second, third or fourth class within this state under and by virtue of any law thereof, adjacent to or within two miles of the limits of any city of the first, second, third or fourth class or any constitutional charter city, unless the city, town or village be in a different county from the city, except that a city, town or village may be incorporated within the two mile area if a petition signed by the majority of the inhabitants of the area proposed to be incorporated is presented to the existing city requesting that the boundaries of the existing city be extended to include the area proposed to be incorporated and if action taken thereon by the existing city is unfavorable to the petition or, if no action is taken by the existing city on the petition, then the city, town or village may be incorporated after the expiration of one year from the date of the petition."

Honorable G. William Weier

Section 15 of Article VI of the Constitution states:

"The general assembly shall provide by general laws, for the organization and classification of cities and towns. The number of such classes shall not exceed four; and the powers of each class shall be defined by general laws so that all such municipal corporations of the same class shall possess the same powers and be subject to the same restrictions. The general assembly shall also make provisions, by general law, whereby any city, town or village, existing by virtue of any special or local law, may elect to become subject to, and be governed by, the general laws relating to such corporations."

We have examined Section 72.130 and find no clear violation of any constitutional provision.

It is a well-settled principle of constitutional construction that, only when there is a clear conflict between a legislative enactment and the constitution, are the courts warranted in declaring the law to be void. In the Matter of Burris, 66 Mo. 442, 450 (1877), Borden Co. v. Thomason 353 S.W. 2d 735, 756 (Mo. 1962).

Very truly yours,

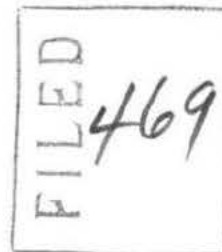
JOHN C. DANFORTH
Attorney General

Answer by Letter (Klaffenbach)

September 11, 1970

OPINION LETTER NO. 469

Honorable R. J. King, Jr.
State Representative
39th District
St. Louis County
816 South Hanley Road
Clayton, Missouri 63105



Dear Representative King:

This letter is in response to your opinion request in which you ask whether a junior college district has the authority to buy land and construct a building outside of its college district in order to serve an area outside the district.

While we find no Missouri cases on the subject we note that the boundaries of a junior college district must conform to the requirements of Section 178.790, RSMo 1969, and that Section 178.850, RSMo 1969, requires that such a junior college district provide instructions for pupils resident within the district who qualify and that accepted non-residents may attend such a junior college district upon the payment of a tuition fee.

Under Section 178.770, RSMo 1969, a junior college district is a body corporate with the same corporate powers as common and six-director school districts, other than urban districts.

We find no express provision authorizing a junior college district to establish a facility outside of its district boundaries in order to serve non-residents and in our view the statutes do not imply any such authority.

We conclude therefore in answer to your question that a junior college district has no authority to establish a building outside of its district for the purpose of serving an area outside of the district.

Very truly yours,

JOHN C. DANFORTH
Attorney General

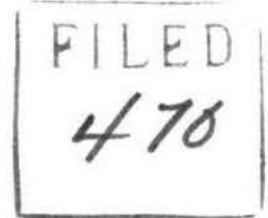
MOTOR VEHICLES:
CRIMINAL LAW:
DRUNKEN DRIVING:

Section 564.440, RSMo 1969, does not require operation of a motor vehicle upon a public highway as a condition precedent to a charge of operating a motor vehicle while in an intoxicated condition.

September 4, 1970

OPINION NO. 470

Honorable George J. Pruneau
Prosecuting Attorney
Wayne County
100 North Main Street
Piedmont, Missouri 63957



Dear Mr. Pruneau:

This official opinion is issued in response to the request contained in your letter concerning the operation of a motor vehicle while intoxicated. Specifically, the question presented is as follows:

" * * * In light of current constitutional concepts, does 564.440 require operation of a motor vehicle upon a public highway as a condition precedent to the charge of operating a motor vehicle while in an intoxicated condition?"

Section 564.440, RSMo 1969, provides as follows:

"No person shall operate a motor vehicle while in an intoxicated condition. Any person who violates the provisions of this section shall be deemed guilty of a misdemeanor on conviction for the first two violations thereof, and a felony on conviction for the third and subsequent violations thereof, * * * "

In State v. Weston, 202 S.W.2d 50, the Supreme Court of Missouri held that the statute prohibiting the offense of operating a motor vehicle while intoxicated does not require that the motor vehicle be operated upon a public highway. The court said, l.c. 53:

Honorable George J. Pruneau

"Instruction number one hypothesized a finding that the appellant operated a motor vehicle in Madison County while in an intoxicated condition but the instruction did not delimit the place of operation. But, whether the objection is to the instruction's failure to require a finding that the vehicle was driven upon a public highway or to its failure to precisely delimit the place it was driven in Madison County, there is no merit in the objection. The statute does not require that the motor vehicle must have been operated upon a public highway. * * * "

The statute under which defendant was convicted was Section 8401(g), RSMo 1939, which now appears as Section 564.440, RSMo 1969.

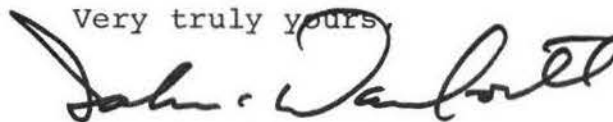
The same result has been reached by the court in State v. Davis, 143 S.W.2d 244; State v. Pike, 278 S.W.725; and State v. Hatcher, 259 S.W. 467.

CONCLUSION

Therefore, it is the opinion of this office that Section 564.440, RSMo 1969, does not require operation of a motor vehicle upon a public highway as a condition precedent to a charge of operating a motor vehicle while in an intoxicated condition.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John E. Park.

Very truly yours,



JOHN C. DANFORTH
Attorney General

NOTE: Section 168.131, RSMo 1978, Answer by Letter (Bartlett)
was repealed by Senate Bill
No. 580, Laws 1982.

October 2, 1970

OPINION LETTER NO. 472

Honorable Robert Pentland
State Senator
First District
6429 Gravois
St. Louis, Missouri 63116



Dear Senator Pentland:

This letter is in response to your request for the ruling of this office on three questions pertaining to Section 168.131, RSMo 1969.

Section 168.131 states in full:

"No teacher shall be employed to teach in the schools of Missouri who has not furnished a certificate by a reputable physician, showing the teacher to be in good health and free from any contagious disease at the time the certificate is granted."

The questions that you ask are:

"1. Is Section 168.131 RSMo Cum. Supp. 1967 applicable to the School District comprised of the City of St. Louis?

"2. Is this section statutory authority for the requirement of an annual physical examination of each of the system's personnel?

"3. Employees who do not present a physical examination report by September 8, 1970, are subject to action determined applicable under state statutes. What statutes, if any, are applicable to this situation?"

Honorable Robert Pentland

In answer to your first question, Section 168.131 provides that "no teacher shall be employed to teach in the schools of Missouri. . . ." The school district comprised of the City of St. Louis is a metropolitan school district as that term is defined in Section 160.011, RSMo 1969. Metropolitan school districts are not excluded from the coverage of Section 168.131. Therefore, we conclude that Section 168.131 applies to all teachers employed to teach in the schools of Missouri including those employed by the school district comprised of the City of St. Louis.

In answer to your second question, Section 168.131 applies only to "teachers" and not to all personnel. In this respect, we enclose Opinion No. 421, dated October 16, 1969, to Walsh, in which we concluded that Section 168.131 does not apply to non-certificated building employees of the Board of Education for the City of St. Louis.

Your second question, however, raises additional questions with respect to the two classes of teachers in a metropolitan school district -- probationary and permanent teachers. See Section 168.221, RSMo 1969.

A probationary teacher is appointed on a school year basis, Section 168.221, RSMo 1969, and must, under the provisions of Section 168.131, furnish a health certificate at the beginning of each year of employment. We note, in this respect, that the time of furnishing the required certificate is referable to the actual period of employment of the teacher and not the date of execution of the contract of employment. Tate v. School Dist. No. 11 of Gentry County, 23 S.W.2d 1013 (Mo., 1930).

The contract between a permanent teacher and a metropolitan school district is permanent and continues in effect subject only to removal for the causes set forth in Sections 168.221 and 168.281, RSMo 1969. A permanent teacher must, under Section 168.131, furnish a health certificate only at the commencement of the actual period of employment under the permanent contract and not each year thereafter.

However, another question indirectly raised by your second question is whether the school board of a metropolitan district may propound a regulation requiring all personnel including permanent teachers to submit an annual health certificate.

Section 171.011 authorizes the school board of each school district in the state to make needful rules and regulations. This section states in full:

"The school board of each school district
in the state may make all needful rules

Honorable Robert Pentland

and regulations for the organization, grading and government in the school district. The rules shall take effect when a copy of the rules, duly signed by order of the board, is deposited with the district clerk. The district clerk shall transmit forthwith a copy of the rules to the teachers employed in the schools. The rules may be amended or repealed in like manner."

"The school board of each school district in the state . . ." is broad enough to include the board of a metropolitan school district. Furthermore, Sections 168.221 and 168.281, which pertain exclusively to metropolitan school districts, refer to "published regulations of the school district. . . ."

Reasonable requirements with respect to the health of school teachers serve to protect children as well as other teachers and would be a proper exercise of the regulatory powers granted to a school board by Section 171.011. Therefore, we believe that the school board of a metropolitan school district could require an annual physical examination of all teachers including permanent teachers.

In answer to your third question, all teachers in a metropolitan school district who are covered by the terms of Section 168.131 (all probationary teachers and those permanent teachers who are in the initial year of their permanent employment) should not be permitted to actually begin teaching until they have furnished the required health certificate. See definition of "employed" for purposes of Section 168.131 in the Tate case, supra. Furthermore, we assume non-compliance with a Missouri statute pertaining to the qualifications of a teacher to teach in the schools of Missouri would constitute a breach of a probationary teacher's contract. For a permanent teacher in the initial year of his permanent employment with a metropolitan district to not comply with a Missouri law "governing the public schools of the state" would constitute cause for removal under Sections 168.221 and 168.281.

In the event the school board has a published regulation requiring all teachers to submit a health certificate by a certain day, the penalty for non-compliance with that regulation may also be provided in the regulations. However, for permanent teachers, non-compliance with a published regulation of the school district

Honorable Robert Pentland

would constitute cause for removal under Sections 168.221 and 168.281.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosure:

Opinion No. 421, Walsh, October 16, 1969

COUNTIES:
COOPERATIVE AGREEMENTS:
CITIES, TOWNS & VILLAGES:

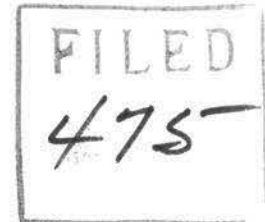
1. A third class county may enter into a cooperative agreement for operation of a common dumping ground with fourth class municipalities of

such county. 2. A third class county may enter into a cooperative agreement for operation of a common dispatch service for the peace officers of the county and contracting municipalities. 3. Fourth class cities may enter into a cooperative agreement for a common sewer system.

OPINION NO. 475

October 20, 1970

Honorable Peter H. Rea
Prosecuting Attorney
Taney County Court House
Forsyth, Missouri



Dear Mr. Rea:

This is in reply to your letter requesting an opinion of this office in which you ask the following questions:

"1. May a third class county, Taney County, Missouri, enter into a contract and agreement with the fourth class municipalities within its boundaries for the operation and maintenance of a sanitary landfill and dumping grounds?

"2. May Taney County, Missouri enter into a contract and cooperative agreement with the municipalities within its boundaries for the proper operation of dispatching service for all police officers, cars and units in the county and municipalities, and for the common maintenance, upkeep, feeding of prisoners and maintenance of a jail for all prisoners in the county?

"3. Would the Sheriff of Taney County, Missouri be a party to such a contract as described in sub-paragraph 2 above? Or, may the County Court and the City Councils of the municipalities in the county and situation above described enter into a cooperative contract and agreement for the purchase of telephone service for all police units and officers?

Honorable Peter H. Rea

"4. May the city of Branson, a 4th class municipality, and the city of Hollister, a 4th class municipality, enter a common agreement and cooperative contract for the operation, maintenance and construction of a common sewer system? May other municipalities join in this effort, and may Taney County become a party to said contract?"

The first question asks whether Taney County may enter into a cooperative agreement consistent with Section 70.220, RSMo 1969, with a fourth class municipality within its boundary for the operation of a sanitary landfill or dumping ground. By reference to Section 64.490, RSMo 1969, it can be seen that Taney County is given the statutory authority to enter into a cooperative agreement with the fourth class municipalities of its county for the operation of a dumping ground:

"1. Any county of the second, third or fourth class may purchase or lease, maintain and operate a dumping grounds for the disposal of ashes, garbage, refuse and rubbish as defined in sections 64.460 to 64.487 and may agree or contract with any municipality within the county for the operation of a dumping grounds, as provided in chapter 70, RSMo.

"2. Any dumping grounds operated under the provisions of this section shall be inspected by the state division of health and is subject to the rules and regulations promulgated by the division pursuant to section 64.477."

Your second question asks whether Taney County may enter into a cooperative agreement with municipalities in Taney County for the maintenance of a common jail for all prisoners in the county, and for their common upkeep. Additionally, you ask in your third question who would be the proper parties to this contract. Find enclosed Opinion No. 50, Keeler, February 22, 1968, which we feel answers your question concerning the maintenance of a common jail. Additionally, your second question asks whether Taney County may enter into a cooperative agreement with the municipalities in its county for the operation of a dispatch service with cars and other units of all peace officers in Taney County.

As to your question as to the authority to enter a cooperative agreement consistent with Section 70.220, RSMo 1969, for the operation of a dispatch service for all police officers, cars, and units in the county and municipalities, we think it an obvious incidental

Honorable Peter H. Rea

power to the powers of the sheriff and the municipalities, and hold that the sheriff of Taney County, may enter into a contract with the municipalities in Taney County, for the operation of a dispatch service for the county and municipality peace officers with the approval of the county court, consistent with Section 70.220, and Opinion No. 23, Kuhlman, January 21, 1970.

Your last question asks whether Taney County may cooperate consistent with Section 70.220, with the fourth class municipalities in Taney County for the operation, maintenance, and construction of a common sewer system. Find enclosed Opinion No. 40, Hibbard, May 12, 1952, which we feel answers this question. Additionally, you ask whether the cities of Branson, and Hollister, and other fourth class municipalities of Taney County, may enter into a cooperative agreement amongst themselves for the operation, maintenance, and construction of a common sewer system. Consistent with Section 88.832, RSMo 1969, fourth class cities are specifically given authority for the establishment of a general sewer system:

"The governing body of any municipality shall have power to cause a general sewer system to be established, which shall be composed of four classes of sewers, to wit, public, district, joint district, and private sewers. Public sewers shall be established, along the principal courses of drainage, at such time, to such extent, of such dimensions, and under such regulations as may be provided by ordinance. These may be extensions or branches of sewers already constructed or entirely new throughout, as may be deemed expedient. The municipality may levy a tax on all property made taxable for state purposes over the whole municipality to pay for the constructing, reconstructing and repairing of the work, which tax shall be called 'special public sewer tax' and shall be of the amount as may be required for the sewer provided by ordinance to be built; and the fund arising from the tax shall be appropriated solely to the constructing, reconstructing and repairing of the sewer."

Fourth class cities have authority to construct sewer lines outside the limits of such cities. City of Ash Grove v. Davis, 418 S.W.2d 194 (Spr.Ct.App. 1967).

Thus, in light of the fact that fourth class cities may establish sewer systems, it is the conclusion of this office that consistent with Section 70.220, RSMo 1969, fourth class municipalities

Honorable Peter H. Rea

of Taney County may enter into a cooperative agreement for the construction, operation, and maintenance of a common sewer system.

CONCLUSION

It is, therefore, the opinion of this office that:

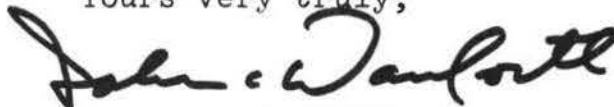
1. A third class county may enter into a cooperative agreement for operation of a common dumping ground with fourth class municipalities of such county.

2. A third class county may enter into a cooperative agreement for operation of a common dispatch service for the peace officers of the county and contracting municipalities.

3. Fourth class cities may enter into a cooperative agreement for a common sewer system.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Kenneth Romines.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 50
2-22-68, Keeler

Op. No. 40
5-12-52, Hibbard

Op. No. 23
1-21-70, Kuhlman

OFFICERS:
LEGISLATURE:
LEGISLATORS:
CONSTITUTIONAL LAW:
CONFLICT OF INTEREST:

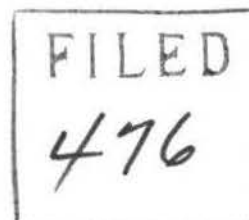
1. A state representative who has a permit to own and operate an official motor vehicle inspection station is not an officer or employee of the state and does not violate the provisions of Article

III, Section 12 of the Constitution of Missouri. 2. A state representative who has a permit to own and operate an official motor vehicle inspection station does not violate the provisions of Section 105.490, RSMo.

OPINION NO. 476

October 28, 1970

Honorable Alvin E. Waits
State Representative
District No. 20
507 Brookside
Independence, Missouri 64053



Dear Representative Waits:

This is in response to your request for an opinion from this office as follows:

"I request an official opinion on the question whether a state representative would violate the law if a filling station owned by such representative were designated as an official inspection station under the Motor Vehicle Safety Inspection Act by the Superintendent of the State Highway Patrol."

Article III, Section 12, Constitution of Missouri, provides as follows:

"No person holding any lucrative office or employment under the United States, this state or any municipality thereof shall hold the office of senator or representative. When any senator or representative accepts any office or employment under the United States, this state or any municipality thereof, his office shall thereby be vacated and he shall thereafter perform no duty and receive no salary as senator or representative. During the term for which he was elected no senator or representative shall accept any appointive office or employment under this state which is created or the emoluments of which are increased during

Honorable Alvin E. Waits

such term. This section shall not apply to members of the organized militia, of the reserve corps and of school boards, and notaries public."

This constitutional provision prohibits a state representative from holding any other office or employment of this state or a municipality thereof. The question presented is whether a state representative who owns and operates a filling station designated as an official inspection station under the Motor Vehicle Safety Inspection Act by the State Superintendent of the Highway Patrol is an officer or employee of this state due to the fact he owns or operates such station.

Section 307.350, RSMo, requires all motor vehicles described therein to be inspected by the duly authorized official inspection station. Section 307.360, RSMo, provides the application for a permit for an official inspection station to be made to the Missouri State Highway Patrol and that the Superintendent of the Highway Patrol shall investigate such application and determine whether or not the premises, equipment, and personnel meet the requirements prescribed by him. It also provides the permit may be revoked by him for any violation of the rules established by the Superintendent.

Section 307.365, RSMo, provides for the official inspection station to charge a fee of \$2.50 for the inspection of each motor vehicle, the fee to be paid by the owner of the vehicle inspected at the inspection station.

The question is whether the owner and operator of such inspection station designated by the Superintendent of the State Highway Patrol is an officer or employee of the state.

Some of the elements necessary in determining whether a person is an officer of the state are stated in *State v. Truman*, 333 Mo. 1018, 64 S.W.2d 105, 1.c. 106 (en banc 1933) as follows:

"Numerous criteria, such as (1) the giving of a bond for faithful performance of the service required, (2) definite duties imposed by law involving the exercise of some portion of the sovereign power, (3) continuing and permanent nature of the duties enjoined, and (4) right of successor to the powers, duties, and emoluments, have been resorted to in determining whether a person is an officer, although no single one is in every case conclusive, 46 C. J. p. 928, § 19, n. 1; 53 A. L. R. p. 595.

Honorable Alvin E. Waits

It is the duty of his office and the nature of the duty that makes one an officer and not the extent of the authority (Mechem on Public Officers, p. 7, § 9; Throop on Public Officers, pp. 2, 3 § 2), although designation by law has some significance. 46 C. J. p. 931, § 24; State ex rel. v. Gray, 91 Mo. App. 438, 445; State ex rel. Cannon v. May, 106 Mo. 488, 505, 17 S. W. 660; State ex rel. v. Shannon, 133 Mo. 139, 164, 33 S. W. 1137; Gracey v. St. Louis, 213 Mo. 384, 393, 394, 111 S. W. 1159.

"In Mechem on Public Officers, pp. 1 and 2, § 1, it is said: 'A public office is the right, authority and duty, created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public. The individual so invested is a public officer.' . . ."

In determining whether the owner or operator of such inspection station is an employee of the state, the court in Rider v. Julian, 365 Mo. 313, 282 S.W.2d 484, 1.c. 493 (en banc 1955) stated:

"None of the . . . employees were paid by the state. This is a strong factor indicating that they were not state employees . . . In 81 C.J.S., States, § 53, p. 973, with reference to state employees, it is stated: 'Payment of particular persons by the state is a very strong circumstance showing that they are state employees, and it has been held that one becomes a civil servant or employee only when he furnishes his services or labor for compensation directly paid to him by the state * * *'"

Applying these principles of law to the facts at issue, it is our opinion that the holder of a permit to inspect motor vehicles is not an officer or employee of the state in the provision of Article III, Section 12 of the Constitution. He certainly is not an officer because he is not vested with any of the sovereign functions of the government to be exercised by him for the benefit of the public at large and neither does he meet the requirements necessary for him to become an employee of the state as his compensation is

Honorable Alvin E. Waits

paid by the owner of the vehicle inspected. His relationship with the state is similar to that of any other person who is licensed by the state to operate a business or practice a profession.

Section 105.490, RSMo, provides as follows:

"1. No officer or employee of an agency shall transact any business in his official capacity with any business entity of which he is an officer, agent or member or in which he owns a substantial interest; nor shall he make any personal investments in any enterprise which will create a substantial conflict between his private interest and the public interest; nor shall he or any firm or business entity of which he is an officer, agent or member, or the owner of substantial interest, sell any goods or services to any business entity which is licensed by or regulated in any manner by the agency in which the officer or employee serves.

"2. Any person who violates the provisions of this section shall be adjudged guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than five hundred dollars or by confinement for not more than one year, or both."

Section 105.450 provides that the following terms have the meanings indicated:

"(1) 'Agency', any department, office, board, commission, bureau, institution or any other agency, except the legislative and judicial branches, of the state or any political subdivision thereof including counties, cities, towns, villages, school, road, drainage, sewer, levee and other special purpose districts;"
(Emphasis added)

As pointed out above, legislators are not officers or employees of the state insofar as owning or operating a motor vehicle inspection station; and, therefore, Section 105.490, supra, does not apply. Furthermore, Section 105.490, supra, does not apply to members of the legislature because they are specifically exempted from such section by the definition of "agency" in Section 105.450, supra.

Honorable Alvin E. Waits

CONCLUSION

It is the opinion of this office that:

1. A state representative who has a permit to own and operate an official motor vehicle inspection station is not an officer or employee of the state and does not violate the provisions of Article III, Section 12 of the Constitution of Missouri.

2. A state representative who has a permit to own and operate an official motor vehicle inspection station does not violate the provisions of Section 105.490, RSMo.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

Answer by letter-Wood

September 25, 1970

OPINION LETTER NO. 477

Mr. Joseph Jaeger, Jr.
Director of Parks
Missouri State Park Board
P. O. Box 176
1204 Jefferson Building
Jefferson City, Missouri 65101



Dear Mr. Jaeger:

You have inquired if the Missouri State Park Board has existing statutory authority to impose state park entrance fees.

Section 253.080(1), RSMo, provides:

"The park board may construct, establish and operate suitable public services, privileges, conveniences and facilities on any land, site or object under its jurisdiction and control, and may charge and collect reasonable fees for the use of the same. The park board may charge reasonable fees for supplying services on state park areas. Any facilities so constructed under this provision shall only be done by appropriated funds."

In view of this statute, it is my opinion that the State Park Board does not have existing statutory authority to charge and collect fees for entrance to the state parks. Fees for use of, or supplying of public services, privileges, conveniences or facilities within the parks is not the same as fees for obtaining access to such services, privileges, conveniences or facilities. Use of public roads and highways leading into state parks is not, in my opinion, use of facilities constructed or established thereon that would warrant imposition of fees pursuant to the statute.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Answer by letter-Wieler

OPINION LETTER NO. 478

September 11, 1970

Honorable Thomas B. Burkemper
Prosecuting Attorney
Lincoln County Court House
Troy, Missouri 63379



Dear Mr. Burkemper:

This is in response to your request for an opinion concerning the question of whether the City of Elsberry, Missouri, is entitled to reimbursement for the use of a city hall as a polling place in the recent primary election, said hall having been designated as a polling place by the county clerk pursuant to Section 111.121, RSMo 1969.

Section 111.121 provides:

"The county clerk, board of election commissioners, or other proper election official having authority over any general, special or local election may designate tax-supported public buildings to be used as polling places, and no official having charge or control of any public building shall refuse to permit the use of the building for election purposes."

With the exception of Section 118.160, RSMo 1969, the Missouri statutes are completely silent with regard to the payment of rent for the use of tax-supported public buildings as polling places. Section 118.160 provides that a political subdivision or governmental agency which controls the building or facility selected as a polling place in St. Louis City may charge a limited rental fee for the use of such building. It seems clear then that if the legislature had intended that political subdivisions be allowed to charge rental fees for the use of their buildings and facilities as polling places in all instances, it would have said so specifically.

Honorable Thomas B. Burkemper

In the absence of any specific provision authorizing the City of Elsberry to charge a rental fee for the use of its city hall as a polling place and in view of the provisions of Section 111.121 permitting no interference with the use of a public building as a polling place by any official having charge or control of such building, it is our opinion that the city cannot charge for the use of its building as a polling place where such building has been so designated by the county clerk pursuant to Section 111.121.

Yours very truly,

JOHN C. DANFORTH
Attorney General

CITIES, TOWNS AND
VILLAGES:
CITY ADMINISTRATOR:

A city administrator appointed under the provisions of Section 77.042 to Section 77.048, RSMo 1969, may be authorized by the governing body of

a third class city to appoint and discharge any employees of the city even though such employees operate under the Park Boards, the Public Work Boards or the police merit system. The city council of a third class city does not have authority to give the city administrator general superintending control of the administration and management of the departments under the control of the various boards such as the Park Board or the Board of Public Works or to give the city administrator any control beyond that heretofore exercised by the mayor himself.

OPINION NO. 479

December 10, 1970



Honorable James I. Spainhower
State Representative
117th District
State Capitol Building
Jefferson City, Missouri 65101

Dear Representative Spainhower:

This letter is in response to your opinion request in which you ask the following questions:

"(1) Can a City Administrator employed by a 3rd class city under this Act be placed in charge of the employees, including their hiring and firing, who serve under Park boards, Public Works boards, and Police Personnel Merit System boards when said boards have been established according to the proper statutory provisions?

"(2) Does the City Council of a 3rd class city have the authority, under this Act, to give the City Administrator general superintending control of the administration and management of the departments under the con-

Honorable James I. Spainhower

trol of the various boards and may said City Council provide that any order of the Administrator would take precedence over a directive of the appropriate board?"

We understand that the boards inquired about in your question are those boards created under Sections 90.500, RSMo 1969 et seq. (Park Board), Section 91.450, RSMo 1969 et seq. (Board of Public Works), and Section 85.541, RSMo 1969 (Personnel Board).

Sections 77.042 to 77.048, RSMo 1969 (House Bill No. 284 of the Seventy-fifth General Assembly), to which you refer provides:

77.042 "The governing body of any city of the third class, except those organized under the provisions of sections 78.430 to 78.640, RSMo, and any fourth class city may by ordinance provide for the employment by the governing body with the approval of the mayor of a city administrator who shall be the chief administrative assistant to the mayor and who shall have general superintending control of the administration and management of the government business, officers and employees of the city, subject to the direction and supervision of the mayor."

77.044. "1. The governing body shall provide, as minimum qualifications, that the city administrator be at least twenty-one years of age, a resident of the city while serving as city administrator, and that he devote his full time to the performance of the duties of his office. The governing body may also require that the city administrator meet other personal qualifications.

"2. The city administrator shall receive a salary as set by ordinance, and shall serve at the pleasure of the appointing authority."

77.046. "Upon the adoption of a city administrator form of government, the governing body of the city may provide that all other officers and employees of the city, except elected officers, shall be appointed and dis-

Honorable James I. Spainhower

charged by the city administrator, but the governing body may make reasonable rules and regulations governing the same."

77.048. "Except as provided in sections 77.042 to 77.048, the mayor and city council of any third class city and the mayor and board of aldermen of any fourth class city which adopts the city administrator form of government shall retain all the powers given to it by the laws applying to the city before the city administrator form of government was adopted, and all laws governing the city under its prior form of government and not inconsistent with the provisions of sections 77.042 to 77.048 shall apply to and govern the city after it adopts this form of government. All bylaws, ordinances, and resolutions lawfully passed and in force at the time the city administrator form of government is adopted shall remain in force until repealed or altered by the council or board of aldermen."

In resolving this question we of course have to consider the applicable rules of statutory construction. It is clear that general and special statutes should be read together and harmonized if possible and the general rule is also that to the extent of any repugnancy the special statute will prevail State ex rel. American Central Ins. Co. v. Gehner, 280 S.W. 416 (Mo. 1926). Where the special statute is enacted later it will be regarded as an exception to, or qualification of a prior general one, and where the general act is later, the special act will be construed as remaining an exception to its terms; unless it is repealed in express words or by necessary implication. Dalton v. Fabius River Drainage Dist., 219 S.W.2d 289 (Mo.App. 1949).

With these basic rules in mind and proceeding upon the general premise that conflicting statutes must be harmonized to such an extent as is possible we will proceed to answer your questions.

Section 77.046 clearly authorizes the governing body of the city to provide that all other officers and employees of the city, except elected officers, shall be appointed and discharged by the city administrator, but, that the governing body may make reasonable rules and regulations governing the same. Section 77.048 provides that all laws governing the city under its prior form of government and not inconsistent with the provisions of Section

Honorable James I. Spainhower

77.042 to Section 77.048 shall apply and govern the city after the adoption of the city administrator form of government. The provisions with respect to the Park Board, particularly Section 90.550, RSMo 1969, authorizes the Park Board to appoint a suitable person to take care of said parks and necessary assistants and to fix their compensation and gives the board the power to remove such appointees. Under Section 91.500, RSMo 1969, the Board of Public Works has the power to appoint a chief superintendent and such subordinates including engineers, inspectors and other persons whose compensation shall be provided by ordinance. Likewise under the statutes relating to the police merit system, Section 85.541 provides for a personnel board composed of members of the largest and second largest political parties in equal numbers who are required to give examinations to candidates for appointments and to certify the list of eligibles to the mayor or other appointing authority and, the mayor or other appointing authority is required to hire or promote from a list of eligibles so certified.

First of all with respect to the powers of the city administrator when appointed under Section 77.042, et seq, it is our view that the city administrator does not obtain any greater powers or control of the administration and management of the government business, officers and employees of the city than that exercised by the mayor himself. That is, at first glance a literal reading of the authority given to the administrator might lead one to conclude that he has in fact complete control of all government business. This however, in our view, would be an absurd result and certainly not one intended by the legislature. The administrator is the administrative assistant of and subject to the direction and supervision of the mayor, as expressly provided by Section 77.042 and can exercise no power greater than that exercised by the mayor. It is our view that the "superintending control" given the city administrator subject to the direction and supervision of the mayor by Section 77.042 is the same as the "superintending control" given the mayor of a third class city not under an optional form in Section 77.250, RSMo 1969. In this respect then and in answer to your second question, it is our view that the city council cannot authorize and that these statutes do not authorize the city administrator to exercise control over the Park Board, the Board of Public Works or the Personnel Board. With respect to the hiring and firing of personnel, we note that the statute, Section 77.046 expressly provides that the governing body of the city "may provide that all other officers and employees of the city, except elected officers, shall be appointed and discharged by the city administrator, but the governing body may make reasonable rules and regulations

Honorable James I. Spainhower

governing the same." Clearly then the city administrator may be authorized by the governing body to make appointments and discharges of city personnel, except elected officers, but whether or not he is given such authority is of course up to the "governing body."

In this respect then the governing body may authorize the city administrator to make appointments heretofore made by the Park Board or by the Board of Public Works and may also provide that the city administrator have authority to discharge such employees.

Insofar as the merit system personnel board is concerned, Section 85.541, it is our view that as we have indicated, the authority of the city administrator may be limited by reasonable rules and regulations with respect to the appointment or discharge of such merit system personnel and it is not required that he perform any function heretofore performed by any individual or group under Section 85.541. The statutory authority giving the city administrator the general superintending control of the administration of the city government does not require that he replace the personnel board. Unless the ordinance adopting the provisions of Section 85.541 is repealed such personnel board would continue to exercise its powers as therein provided. While it is true that the city administrator may be authorized by the governing body to make all appointments and discharges, nevertheless, we reiterate the governing body is not required to give him this authority and may if it wishes give him only the authority which was previously given to the mayor or "other appointing authority" under that section; that is, to appoint or promote from a list of eligibles certified, or to suspend, demote or discharge subject to a public hearing before the personnel board. The governing body may, if it wishes, refuse to give the city administrator any authority whatsoever with respect to appointments and discharges within the police merit system, and may refuse to give the city administrator the authority to appoint or discharge any employees or any group of employees within any division of the city government.

CONCLUSION

It is the opinion of this office that a city administrator appointed under the provisions of Section 77.042 to Section 77.048, RSMo 1969, may be authorized by the governing body of a third class city to appoint and discharge any employees of the city even though

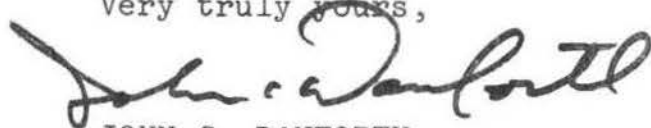
Honorable James I. Spainhower

such employees operate under the Park Boards, the Public Work Boards or the police merit system.

The city council of a third class city does not have authority to give the city administrator general superintending control of the administration and management of the departments under the control of the various boards such as the Park Board or the Board of Public Works or to give the city administrator any control beyond that heretofore exercised by the mayor himself.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Klaffenbach.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a stylized "D".

JOHN C. DANFORTH
Attorney General

(Answer by Letter) Bartlett

September 30, 1970

OPINION LETTER NO. 484



Mr. Hubert Wheeler
Commissioner of Education
State Department of Education
Jefferson State Office Building
Jefferson City, Missouri 65101

Dear Mr. Wheeler:

In accordance with your request of August 27, 1970, we have reviewed the Missouri State Board of Education's Application for Program Grant for Migratory Children (Fiscal Year 1971). This application is being submitted under Title I of the Elementary and Secondary Education Act of 1965, P.L. 89-10, as amended by P.L. 89-750.

In addition to the Elementary and Secondary Education Act of 1965, as amended by P.L. 89-750, and the Regulations pursuant thereto, our review has taken into consideration Article III, Section 38(a), Missouri Constitution, and Section 161.092, RSMo 1969.

Based on the foregoing, we hereby certify that the Missouri State Board of Education has authority under state law to perform the duties and functions of a "state educational agency" as defined in Title I of P.L. 89-10 (20 U.S.C., Section 244) including those arising from the assurances set forth in the application and that the State Board of Education has the authority to submit and administer the special educational programs and projects for migratory children as set forth in the application.

All provisions of this application are consistent with state

Mr. Hubert Wheeler

law with the exception of paragraph 11 B. 1 on page 8 of the application.

This opinion letter constitutes our official certification and should be inserted in the appropriate place in each copy of the application. We are returning herewith two copies of the application.

Very truly yours,

JOHN C. DANFORTH
Attorney General

STATE AID:
JUNIOR COLLEGES:
SCHOOLS:

A junior college district has no authority to conduct classes outside of its district boundaries and is not, therefore, entitled to receive state aid for nonresidents of the district enrolled in classes outside of its district boundaries even though they may be Missouri residents.

OPINION NO. 489

October 20, 1970

Honorable Richard M. Webster
State Senator
Thirty-second District
112 North Webb Street
Webb City, Missouri 64870



Dear Senator Webster:

This is in response to your opinion request in which you asked whether a junior college is entitled to receive state aid for Missouri residents enrolled in classes offered outside of the college district.

Included with your opinion request was a letter from Mr. Dell Reed, President of Crowder College, outlining the particular facts surrounding the opinion request. This letter provides as follows:

"Crowder College Trustees, cooperatively with the Monett Board of Education, have planned for the offering of college credit courses by Crowder College in the Monett schools during the evening, beginning in September, 1970.

"Monett, which is just outside of the Crowder College district, has requested the arrangement whereby students of that area may take college credit courses during the evening hours in their community.

"The plan which we have worked out with the Monett schools is that students will

Honorable Richard M. Webster

be admitted to the classes under the regular policies and procedures of Crowder College as stated in the college catalog. The same standard of instruction and evaluation will be used in the classes at Monett as used in the classes on the campus of Crowder College. Course descriptions, course outlines, textbooks, and in most cases instructors will be the same as those on the campus in Neosho.

"The purpose of this letter is to ask for an interpretation regarding the regular state aid for junior college instruction for this educational program outside of the Crowder College district. Is there any reason why Crowder College could not expect to receive the regular Missouri state aid for Missouri residents enrolled in classes offered by the college in Monett? An early reply to this question would be very helpful to us as we continue to plan for the enrollment of students this fall."

We understand your request to be whether a junior college district is entitled to receive state aid for those Missouri residents who are nonresidents of the junior college district and who are enrolled in classes conducted outside of the district boundaries.

Section 163.191, RSMo 1969, provides that a junior college district is entitled to include in its attendance records for the purpose of computing state aid all Missouri residents attending schools or classes of that district. This statute provides in part as follows:

"All students, resident in the state of Missouri, attending schools or classes of a junior college district shall be included in the attendance records of the junior college district for the apportionment of school funds. . . ."

The underlying question is whether a junior college district has the authority to conduct classes in areas outside of its district in order to serve the needs of those areas. In answering this question, we refer to Opinion Letter No. 469, dated September 11, 1970, to Honorable R. J. King, Jr., which is enclosed herein.

Honorable Richard M. Webster

This opinion letter concluded that a junior college district has no authority to establish a building outside of its district for the purpose of serving an area outside the district. The rationale behind the holding was that there is no express statutory provision authorizing a junior college district to establish a facility outside of its district boundaries in order to serve nonresidents. Likewise, we find no statutory authority, either express or implied, for a junior college district to conduct classes for nonresidents of the district outside of the district boundaries as defined in Section 178.790, RSMo 1969.

We note that Section 178.890, RSMo 1969, provides a method by which adjoining school districts may be annexed to a junior college district. Because the legislature enacted Section 178.890, RSMo 1969, in order to meet the needs of those desiring to become a part of a junior college district, we believe it should be complied with when an area such as the Monett School District wants to obtain the benefits of a junior college program.

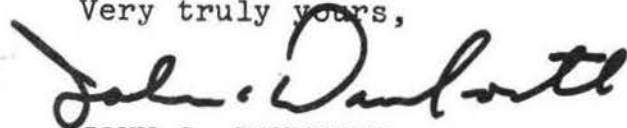
For the above reasons, it is the opinion of this office that a junior college district does not have the authority to conduct classes outside of its district boundaries for the benefit of nonresidents of the junior college district. Because junior college districts lack such authority, they would not be entitled to receive state aid for nonresidents of the district enrolled in classes outside of district boundaries even though they may be Missouri residents.

CONCLUSION

A junior college district has no authority to conduct classes outside of its district boundaries and is not, therefore, entitled to receive state aid for nonresidents of the district enrolled in classes outside of its district boundaries even though they may be Missouri residents.

The foregoing opinion, which I hereby approve, was prepared by my Assistants, J. Michael Jarrard and D. Brook Bartlett.

Very truly yours,



JOHN C. DANFORTH
Attorney General

Enclosure:

Op. No. 469
9-11-70, King

Answered by Letter -Mansur
OPINION LETTER NO. 490

September 11, 1970

Honorable Peter H. Rea
Prosecuting Attorney
Taney County Court House
Forsyth, Missouri 65653



Dear Mr. Rea:

In your recent letter you requested an opinion from this office on whether the conflict of interest statutes or other laws would be violated if an attorney with whom you are associated represents private land owners in condemnation suits by the State Highway Department due to the fact you are the prosecuting attorney.

We are enclosing herewith Opinion No. 403, issued on October 9, 1969, in which it is ruled it is improper for a prosecuting attorney to represent land owners in condemnation cases filed by the State Highway Commission.

We are also enclosing Opinion Letter No. 355, issued by this office on August 19, 1969, in which it was held that it is improper for a law firm to render professional services with regard to any matter which any partner, associate or employee could not properly render.

You will notice these opinions are based primarily on the code of ethics of the Missouri Bar.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosures:

Op. No. 403
10-9-69, Lance

Op. Letter No. 355
8-9-69, Salveter

CITIES, TOWNS AND
VILLAGES:
COUNTIES:

Section 67.400, RSMo 1969, authorizes the governing body of any city, town or village to enact ordinances that provide for the demolition of buildings and structures within the corporate limits of such city, town or village which are detrimental to the health, safety or welfare of the residents and declared to be a public nuisance.

OPINION NO. 491

November 19, 1970

Honorable Harold F. Reisch
State Representative
District No. 119
1013 Falcon Drive
Columbia, Missouri 65201



Dear Representative Reisch:

This is in response to your request for an official opinion on the question whether House Bill No. 60, Seventy-fifth General Assembly (Section 67.400, RSMo 1969) is applicable to all cities, towns and villages or only to cities, towns and villages having a charter.

In construing a statute to determine the legislative intent in case of ambiguity, resort may be had to the history of the statute. Whitehead v. Farmers' Fire & Lightning Mut. Ins. Co., 60 S.W.2d 65 (1933). Therefore, we shall look to the history of this statute from the time it was introduced until it was finally passed for aid in its construction.

As first introduced, Section 1 of House Bill No. 60 disclosed an express legislative intent to have the provisions of the bill apply to any city, town or village as follows:

"The governing body of any city, town or village may enact ordinances to provide for vacation and the mandatory demolition of buildings and structures or mandatory repair and maintenance of buildings or structures within the corporate limits of the city, town or vil-

Honorable Harold F. Reisch

lage which are detrimental to the health, safety or welfare of the residents and declared to be a public nuisance."

During the course of its enactment, the bill was amended by broadening its scope to include any county having a charter form of government. Section 1 of the perfected version of the bill, which was enacted into law and now is Section 67.400, RSMo 1969 is as follows:

"The governing body of any city, town, village, or county having a charter form of government may enact ordinances to provide for vacation and the mandatory demolition of buildings and structures or mandatory repair and maintenance of buildings or structures within the corporate limits of the city, town or village which are detrimental to the health, safety or welfare of the residents and declared to be a public nuisance."

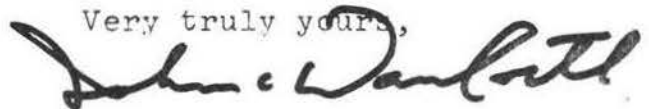
A comparison of the wording of the original draft with the language of the statute as finally enacted shows the construction placed on the bill from the time it was introduced until its enactment as the present statute. Both the original draft and the perfected version of the bill authorize the governing body of any city, town or village to enact ordinances for the purpose stated in the bill. The amendment confers this authority also on counties that have a charter form of government. The perfected version of the bill clearly expresses the legislative intent that the bill applies to all cities, towns and villages but to counties only having a charter form of government.

CONCLUSION

It is the opinion of this office that Section 67.400, RSMo 1969, authorizes the governing body of any city, town or village to enact ordinances that provide for the demolition of buildings and structures within the corporate limits of such city, town or village which are detrimental to the health, safety or welfare of the residents and declared to be a public nuisance.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, L. J. Gardner.

Very truly yours,



JOHN C. DANFORTH
Attorney General

Answered by letter- Romines

October 2, 1970

OPINION LETTER NO. 492

Honorable Raymond Howard
State Senator
District No. 5
705 Chestnut
St. Louis, Missouri 63101



Dear Senator Howard:

This is in reply to a request you made of this office seeking an Attorney General's opinion in which you stated:

"Can a member of the Missouri State Board of Education serve as a member of the Board of Curators of a college of a religious denomination? The college is in Missouri. No compensation or expenses is involved."

The members of the State Board of Education for the State of Missouri are appointed consistent with Section 161.022, RSMo 1969, and must meet the qualifications as set out in Section 161.032, RSMo 1969, which states:

"The members of the board shall be citizens of high moral standards and recognized ability in their respective business or profession, who have resided in the state for not less than five years immediately preceding their appointment, and not more than one of whom shall be a resident of the same county or congressional district. At no time shall more than four members be of the same political party. No member of the board shall be connected, either as an official or as an employee, with any public, private, or denominational school, college or

Honorable Raymond Howard

university, nor be a holder of or candidate for
any public office." [Emphasis added]

By applying the above set out law to your facts, it is the conclusion of this office that a member of the Missouri State Board of Education may not serve as a member of the Board of Curators of a college of a religious denomination in the State of Missouri and at the same time serve as a member of the Missouri State Board of Education.

Yours very truly,

JOHN C. DANFORTH
Attorney General

ELECTIONS:

(1) There is no law regulating or prohibiting the hiring of persons to haul voters to the polls in a primary or general election in a third class county. (2) In a county of the third class, each party committee may select a person in accordance with its bylaws to witness the counting of the ballots and such person should be admitted to the room where the ballots are being counted by the judges of the election if they are satisfied such person has been selected by the party committee.

OPINION NO. 493

October 30, 1970

Honorable Vic Downing
State Representative
One Hundred Sixtieth District
Rural Route #1
Bragg City, Missouri 63827



Dear Representative Downing:

This is in response to your opinion request, as follows:

"The Pemiscot County Fair Election Committee has requested that I obtain from you an Attorney-General's opinion on following:

"1. Legality of the hiring of cars to haul voters to the polls in primary and general elections.

"2. The duties and methods of appointment of 'poll witnesses' in primary and general elections.

"I believe this Committee is doing a good job in our County in their efforts to see that we have fair elections and I will appreciate your opinion on these questions as soon as possible."

We assume the words, "poll witnesses" you have in mind are witnesses present for a counting of the ballots.

Honorable Vic Downing

Pemiscot County is a third class county.

In regard to the first question, we enclose herewith Opinion No. 263 issued by this office September 9, 1969, holding that Section 78.550, RSMo prohibits candidates or other interested persons from hauling voters to the polls with the intent and purpose of influencing their vote. Section 78.550, supra, applies to city elections in a third class city with city manager form of government. It has no application to the state and county primary or general election.

There is no statute prohibiting or regulating the use of automobiles as such in hauling voters to the polls in primary or general elections in a third class county.

In answer to your second question as to the duties and method of appointment of "poll witnesses", in primary and general elections Section 111.501, RSMo provides in part:

"3. No person, other than the judges and clerks of election, shall be admitted into the room or office where ballots are being counted except that a political party may select a representative person who may be admitted as a witness of the counting."

This statute provides that a political party may select a representative person who may be admitted into the room or office to witness the counting of the ballots.

We are unable to find any express statutory provisions setting out the method to be used by a political party in selecting a person to witness a counting of the ballots. Section 120.750, RSMo provides for the central committee of a political party to adopt a constitution and bylaws which may be changed or amended by a majority vote of the total membership of the party committee. It is our view that a person to be admitted to the room where the ballots are counted, must be selected by the party committee in the manner and in accordance with their constitution and bylaws and the judges of the election should admit such person into the room to witness the counting if they are satisfied such person has been selected by the party committee.

CONCLUSION

It is the opinion of this office:

- (1) There is no law regulating or prohibiting the hiring

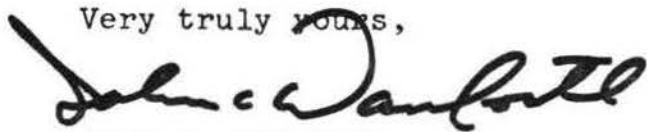
Honorable Vic Downing

of persons to haul voters to the polls in a primary or general election in a third class county.

(2) That in a county of the third class, each party committee may select a person in accordance with its bylaws to witness the counting of the ballots and such person should be admitted to the room where the ballots are being counted by the judges of the election if they are satisfied such person has been selected by the party committee.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and "D".

JOHN C. DANFORTH
Attorney General

Enclosure:

Op. No. 253
9-9-69, Batson

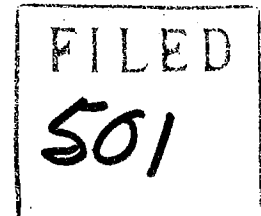
SCHOOLS:

(1) Some or all of the teachers of the St. Charles School District may be placed on a leave of absence pursuant to the provisions of Section 168.124, RSMo 1969, of the Teacher Tenure Act, if the school board of the St. Charles School District reasonably concludes that such action is necessary due to the financial condition of the school district. (2) In determining whether the schools of a district must close due to lack of funds, a school board must take into consideration all available income, including any school money received from the State of Missouri. However, a school board may consider any fixed expenses it will have after school is closed in determining when the available funds of the district have been exhausted. (3) Section 163.091, RSMo 1969, provides the sole remedy available to the state to recover from a school district the excess amount of state school money paid to the district in the current year. Therefore, if the district's application for state school money, report pursuant to Section 163.081, RSMo 1969, and calendar pursuant to Section 171.031, RSMo 1969, as filed with the State Board of Education all indicate that the district is qualified for state aid in the current year, the district will receive its share of state school money in the current year. In the following school year, the district's share of state school money will be reduced by the amount it received in the current year to which it was not entitled. However, should a school district amend any of these documents or otherwise officially notify the State Board of Education in the current year that the district is not qualified under Section 163.021, RSMo 1969, to receive state school money, the State Board of Education would then be obligated to adjust immediately the district's apportionment of school money.

OPINION NO. 501

September 29, 1970

Honorable Arlie H. Meyer
State Representative
District No. 105
234 Thomas Street
St. Charles, Missouri 63301



Dear Representative Meyer:

This official opinion is issued in response to your request for the ruling of this office on the following questions:

"1. Can teachers collect a full year's salary if the Board is forced to close school because of lack of available funds

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Honorable Arlie H. Meyer

"2. In the Attorney General's Opinion No. 446 stating that school must open and expend all financial resources, does this include State aid if it is known that the district cannot maintain 174 classroom days even with State funds, and therefore would be required to pay back the state's money."

Although no factual information was furnished this office with the opinion request, we have subsequently determined from you that the request pertains to the St. Charles School District. With your assistance, we have obtained from this district copies of the contracts entered into with the teachers of that district. We have been advised that the teachers signed the contracts prior to May 1, 1970, and that the president of the school board executed the contracts on May 1, 1970, which is prior to the effective date of the Teacher Tenure Act (July 1, 1970).

In answering your first question, it is necessary to analyze these contracts to determine if the parties contemplated what would happen if a financial crisis in the district forced the closing of school. Although these contracts were entered into prior to the effective date of the Teacher Tenure Act, it is apparent that the parties thought they were entering into agreements which would be governed by it. For instance, one contract form is entitled "Permanent Teacher's Contract" and the other is designated "Probationary Teacher's Contract." Prior to July 1, 1970, there was no statutory provision for, or definition of, "permanent teacher" and "probationary teacher." However, the terms "permanent teacher" and "probationary teacher" are carefully defined in Section 168.104, RSMo 1969, of the Teacher Tenure Act and these terms are used throughout the Teacher Tenure Act. In addition, the contract offered to permanent teachers purports to employ the teacher for an "indefinite period." Under the law governing teachers' contracts in effect on May 1, 1970, a school board of a six-director district was not authorized to grant indefinite contracts to teachers. See Sections 168.101 and 168.111, RSMo Supp. 1967.

Furthermore, in the contracts offered to both permanent and probationary teachers, the provisions of the Teacher Tenure Act are incorporated by reference. In the form of contract offered to permanent teachers, the following language appears:

"It is agreed by the parties that this contract shall continue in force from year to year, until modified or terminated in accordance with the provisions of The Missouri Teacher Tenure Act, Sections 168.101 to Sections 168.116, both inclusive, V.A.M.S. and any amendments thereto,

Honorable Arlie H. Meyer

which provisions, together with the published Rules and Regulations of the Board of Education, are, by reference, made part of this agreement."

The form of contract offered to probationary teachers contains this provision:

"The provisions of the Missouri Teacher Tenure Act, Sections 168.101 to Sections 168.116, both inclusive, V.A.M.S., and any amendments thereto, together with the published Rules and Regulations of the Board of Education, are, by reference, made part of this agreement."

In both contracts, the reference is to the "Missouri Teacher Tenure Act, Section 168.101 to Section 168.116, both inclusive, V.A.M.S." This language is potentially misleading and ambiguous. If taken literally, only those provisions numbered 168.101 through 168.116 in Vernon's Annotated Missouri Statutes, including the 1969-70 Cumulative Annual Pocket Part, would be incorporated into the contract. The Teacher Tenure Act in its entirety begins at Section 168.102 and concludes with Section 168.130. See Section 168.102, RSMo 1969. In both contracts this would mean that crucial provisions of the Teacher Tenure Act were omitted. For example, in the permanent teachers' contracts, the procedure for a termination hearing contained in Section 168.118, and the provision for appeal from the board's decision in a termination hearing provided in Section 168.120 would not be included. For probationary teachers, a literal reading of the contract would mean that the only provision of the Teacher Tenure Act pertaining exclusively to them, Section 168.126, would be omitted from their contracts. We believe the parties intended to incorporate all provisions of the Teacher Tenure Act into their agreement and that the confusion arose because the Revisor of Statutes renumbered the original sections of the Teacher Tenure Act. House Bill No. 120, Laws 1969, the Teacher Tenure Act, contained Sections 168.101 through 168.116. See Vernon's Legislative Service, supplementing V.A.M.S., pp. 454-459 (No. 3, 1969). However, the Revisor of Statutes altered the numbering of these sections so that the Teacher Tenure Act, as it appeared in the 1969-70 Cumulative Annual Pocket Part to V.A.M.S., and in Missouri Revised Statutes, 1969, begins with Section 168.102 and ends with Section 168.130. Therefore, we conclude that the parties to both the permanent and probationary teachers' contracts intended to make all of the provisions of the Teacher Tenure Act a part of the agreements. To conclude that the parties intended to incorporate only irrationally selected sections of the Teacher Tenure Act would not be a reasonable interpretation of the agreements.

Honorable Arlie H. Meyer

Having concluded that the parties intended to incorporate into their agreement all the provisions of the Missouri Teacher Tenure Act, we must now determine whether, under the Missouri Teacher Tenure Act, a school district must pay teachers a full year's salary if the board is forced to close school due to the financial condition of the district. Section 168.124, RSMo 1969, part of the Missouri Teacher Tenure Act, provides as follows:

"Board to place on leave, provisions governing.--
The board of education of a school district may place on leave of absence as many teachers as may be necessary because of a decrease in pupil enrollment, school district reorganization or the financial condition of the school district.
In placing teachers on leave, the board of education shall be governed by the following provisions:

"(1) No permanent teacher shall be placed on leave of absence while probationary teachers are retained in positions for which a permanent teacher is qualified;

"(2) Permanent teachers shall be retained on the basis of merit within the field of specialization;

"(3) Permanent teachers shall be reinstated to the positions from which they have been given leaves of absence, or if not available, to positions requiring like training and experience, or to other positions in the school system for which they are qualified by training and experience;

"(4) No appointment of new teachers shall be made while there are available permanent teachers on unrequested leave of absence who are properly qualified to fill such vacancies;

"(5) A teacher placed on leave of absence may engage in teaching or another occupation during the period of such leave;

"(6) The leave of absence shall not impair the tenure of a teacher;

"(7) The leave of absence shall continue for a period of not more than three years unless extended by the board." (Emphasis supplied)

Honorable Arlie H. Meyer

By this section, the Missouri legislature has granted to the board of education of a school district the authority to place teachers on leaves of absence when the board reasonably believes that the financial condition of the district requires such action. Consistent with other provisions of the Teacher Tenure Act, the subparagraphs of Section 168.124 are designed to assure permanent teachers that a leave of absence under this section will not impair their tenure. A leave of absence granted pursuant to this section would be without pay. It would not be a reasonable interpretation of the statute to say that a district which is authorized to give teachers leaves of absence due to the financial condition of the district would then have to continue to pay the teachers. This would in no way alleviate the strained financial condition of a district which is a prerequisite to granting teachers leaves of absence under Section 168.124. In State ex rel. McGaughey v. Grayston, 349 Mo. 700, 163 S.W.2d 335 (En Banc 1942), the Missouri Supreme Court had occasion to explain the meaning of "leave of absence" in the following way:

" . . . The common meaning of the term signifies temporary absence from duty with an intention to return, during which time remuneration is suspended. . . ." Id. at 341.

Therefore, we conclude that (1) the St. Charles School District and both the permanent and probationary teachers of the district intended to include all the provisions of the Teacher Tenure Act in the contracts executed by the board on May 1, 1970, and (2) the St. Charles School Board, pursuant to the authority granted it by Section 168.124 of the Teacher Tenure Act, may place on leave of absence as many teachers as it reasonably believes necessary because of the financial condition of the school district. Should, as your question assumed, it become necessary that the school board close school because of lack of available funds, the school board may grant any or all teachers a leave of absence pursuant to Section 168.124.

In the event the parties to these contracts intended to incorporate certain provisions of the Teacher Tenure Act but not Sections 168.118 through 168.130, would the board be responsible for paying teachers the full amount of their contract even if the board was forced to close school because of lack of funds?

Article VI, Section 26(a), Missouri Constitution, 1945, provides:

"No county, city, incorporated town or village, school district or other political corporation or subdivision of the state shall become indebted

Honorable Arlie H. Meyer

in an amount exceeding in any year the income and revenue provided for such year plus any unencumbered balances from previous years, except as otherwise provided in this Constitution."

This provision of the Missouri Constitution is self-enforcing and limits the power of a school district to become indebted in an amount exceeding its revenue for the calendar year. Hawkins v. Cox, 334 Mo. 640, 66 S.W.2d 539 (1933); Clarence Special School Dist. v. School Dist. No. 67, 341 Mo. 178, 107 S.W.2d 5, 7 (1937). If a school district incurs a debt as the result of a voluntary contract, the obligation is void if beyond the revenue actually provided for that year. Linn Consol. High School Dist. v. Pointer's Creek Public School Dist., 356 Mo. 798, 203 S.W.2d 721, 724 (1947).

Whether Section 26(a) has been violated is determined by the financial situation of the school district at the time a debt is contracted or created. Pullum v. Consol. School Dist. No. 5, 357 Mo. 858, 211 S.W.2d 30, 34 (1948). The execution of a teacher's contract does not create a debt for the purposes of Section 26(a) because such a contract is wholly executory until the teacher performs his services. The Supreme Court of Missouri discussed when a teacher's contract creates a debt for the purposes of Article X, Section 12, Missouri Constitution, 1875 (Article VI, Section 26(a), Missouri Constitution, 1945) in Tate v. School Dist. No. 11 of Gentry County, 324 Mo. 477, 23 S.W.2d 1013, 1023 (1930):

" . . . It is clear to our minds that such contract is wholly executory, and that the pecuniary liability of the defendant school district thereunder is contingent upon the rendition of such personal services by plaintiff. If, and as, such personal services are properly rendered by plaintiff from month to month, during the term of the contract, the school district becomes indebted to plaintiff for the personal services actually rendered by plaintiff. In the event of the death or disability of plaintiff, either before or during the term of the employment, the contract is terminated and discharged. 'Contracts to perform personal acts are considered as made on the implied condition that the party shall be alive and shall be capable of performing the contract, so that death or disability will operate as a discharge.' 13 C. J. 644, and cases there cited. Thus the contract here in controversy might never be performed by plaintiff [teacher]; in which event, of course, there is no pecuniary liability of

Honorable Arlie H. Meyer

the school district, and consequently no debt on its part. That such contract of employment is wholly executory and contingent is clearly recognized by the school statute (section 11138, R. S. 1919), which provides that, 'should the schoolhouse [which the teacher is employed to teach] be destroyed, the contract becomes void.' We are constrained to the view that the mere execution of the contract of employment did not create a debt of the defendant school district on December 18, 1924, within the meaning or intent of section 12, art. 10, of the Constitution, and that the defendant school district did not become indebted to plaintiff, under the terms of the contract of employment, until the time for the performance of such contract had expired."

Furthermore, in Pullum v. Consol. School Dist. No. 5, supra, the court concluded:

". . . In examining a question whether a debt for a teacher's services is in violation of constitutional limitations on a school district's indebtedness, the debt is considered as contracted or created when the teacher's services are performed. Tate v. School Dist. No. 11 of Gentry County, supra."

With reference to your inquiry, the St. Charles School District would become indebted to its teachers only when the teachers perform their services under the contracts. However, the district is prohibited by Article VI, Section 26(a) from incurring any debt in excess of the revenue provided for that calendar year. Therefore, the school board would not be authorized to permit teachers to perform services under their contracts and thereby become indebted to them when the available funds of the district have been exhausted. [This conclusion is based on the assumption that the school board has fully performed its duties under the contracts and applicable statutes except that it is unable to keep school open due to a lack of available funds. See Dye v. School Dist. No. 32, 355 Mo. 231, 195 S.W.2d 874 (En Banc 1946)].

Your second inquiry involves two questions:

1. Must a school district expend any financial aid it receives from the state before it is authorized to close school because all financial resources have been exhausted?

Honorable Arlie H. Meyer

2. If the district expends all of its financial resources in the 1970-71 school year and does not operate its schools for 180 days including legal school holidays, must the school district pay back all state moneys received in the 1970-71 school year?

In Opinion No. 446, dated September 4, 1970, to the Honorable Harold J. Esser, we concluded in part as follows:

"(3) If all available funds are insufficient to provide for a full nine month term, the school board may refuse to open the schools within its district if it has arranged for all pupils within the district to be educated in another district. If such arrangements are not or cannot be made, then the school board must open and operate its schools until all financial resources are exhausted. When all financial resources have been exhausted, the school board is authorized to close its schools."

Pursuant to the foregoing, the school board of any six-director district in the state may close school when it reasonably determines that all of its available financial resources have been exhausted. The available financial resources may be exhausted prior to the expenditure of the last penny in the account of the district. Whether school must be closed due to lack of funds is a decision which has been entrusted by the Missouri Constitution and statutes to the reasonable discretion of the school board of a district. In reaching this decision a board might take into consideration the amount of money required to provide for certain fixed expenses of the district such as maintenance and security of the district's buildings and other property, insurance premiums, debt service, etc. However, in reaching this decision we believe a school board is obligated to consider as available income all financial resources available to it including any amounts received from the State of Missouri. See Section 163.031(9), RSMo 1969.

To qualify for state financial aid, a school district must comply with Section 163.021, RSMo 1969:

"Eligibility for state aid--requirements.--
A school district shall receive state aid for its educational program only if it:

"(1) Operates its schools for a minimum of one hundred eighty days including legal school holidays as defined in section 171.051, RSMo, and days when the school is dismissed by order of the board to permit teachers to attend teachers' meetings;

Honorable Arlie H. Meyer

"(2) Maintains adequate and accurate records of attendance, personnel and finances, as required by the state board of education, which shall include the preparation of a financial statement which shall be submitted to the state board of education the same as required by the provisions of section 165.111, RSMo, for six-director elementary and high school districts;

"(3) Levies a property tax of not less than one dollar for current school purposes on each one hundred dollars assessed valuation of the district;

"(4) Computes average daily attendance as defined in subdivision (1) of section 163.011. Whenever there has existed within the state an infectious disease, contagion, epidemic, plague or similar condition whereby the school attendance is substantially reduced for an extended period in any school year, the apportionment of school funds and all other distribution of school moneys shall be made on the basis of the school year next preceding the year in which such condition existed."

Also, the school board of each district must prepare each year a calendar for the school term providing for a minimum of 174 days of actual pupil attendance. Section 171.031, RSMo 1969, states:

"Each school board shall prepare annually a calendar for the school term, specifying the opening date and providing a minimum term of at least nine months or one hundred seventy-four days of actual pupil attendance. The term may be extended to ten months when the resources of the school funds justify the extension."

The regulations of the State Board of Education require each district in the state to file its annual school calendar prior to October 15 of each year as part of the district's Application for Classification. See Section 161.092, RSMo 1969.

The amount of state aid each district receives is based on an Application for State School Money, Pupil and Personnel Data and on a Report of Secretary of Board to County Superintendent and State

Honorable Arlie H. Meyer

Board of Education filed with the State Board of Education pursuant to Section 163.081 which provides as follows:

"Distribution of state aid--clerk's reports--penalty--duties of county superintendents, state board and county treasurers.--1. Between June fifteenth and June thirtieth each year the clerk of each school district shall make a report to the county superintendent of schools which shall contain all necessary data for calculating the amounts of state support which each district is to receive for the following school year. The report shall be sworn to before a notary public or the county clerk. After the reports are properly made, the county superintendent shall verify, summarize and forward them to the state board of education with comments on or before July fifteenth. Any district clerk, superintendent or teacher who knowingly furnishes any false information in the reports, or neglects or refuses to make the reports is guilty of a misdemeanor and shall be punished by a fine of not more than five hundred dollars or imprisonment in the county jail for not more than six months or by both such fine and imprisonment.

"2. The state board of education upon receipt of the county superintendent's report shall calculate the amount which each school district is to receive and on or before September fifteenth of each year shall distribute all moneys available August thirty-first to the several districts. Additional distribution of all moneys available November thirtieth and February twenty-eighth shall be made on or before December fifteenth and March fifteenth of each school year. The state board of education shall certify the amounts so apportioned to the comptroller for his approval and warrants shall be issued payable to the several counties and forwarded to them. The county treasurer immediately upon receiving the money shall distribute and credit to the various school districts in the county the amounts due each district as apportioned and reported to the county treasurer and county clerk by the state board of education."

If the application, report and calendar filed by a district pursuant to Sections 163.081 and 171.031 indicate that the district

Honorable Arlie H. Meyer

qualifies for state aid, we believe that the State Board of Education is required to distribute to this district its share of state school money for that school year. In State ex rel. Randolph County v. Evans, 240 Mo. 95, 145 S.W. 40 (Mo. 1912), the county sought a court order compelling the State Superintendent of Schools to apportion to the county the full sum of state aid due it. The State Superintendent contended that the school district in question had filed fraudulent pupil enumerations for the current and past years and that it was his duty to withhold from the current year sufficient moneys to rectify these frauds. The Court pointed out that school enumerations are the responsibility of school boards and that there is a presumption that the acts of a body entrusted by law with the performance of a duty which, on their face, are regularly taken are not subject to collateral attack. Id. at 42.

"If these enumerations are fraudulent, no doubt they could be attacked and corrected in a proper action; but, so long as they exist, the State Superintendent cannot reach them in this collateral proceeding. Until they are corrected in a proper proceeding, he must take them as a basis for a proper distribution of the school money. This view, of course, disposes of the enumerations for all the years, and in effect disposes of the case; but there are other matters urged by the motion to strike out which we prefer to discuss, and these we take next.

"2. But, to my mind, there is another reason why the contention of respondent, Evans, cannot be sustained. His duties as to the distribution of school funds are purely ministerial. No statute authorizes the State Superintendent to revise and correct enumerations on the ground of fraud. Such officer has been furnished with no legal machinery by which he can hold or have a hearing and adjudge the fact of fraud or no fraud in enumeration returns. He is not empowered to bring the interested parties before him. In fact, the law makes no provision for him to make an investigation of the question of fraud. As indicated in the previous paragraph, I have no doubt that in a proper proceeding before a proper tribunal, with the proper parties before such tribunal, fraudulent enumeration lists may be purged of fraud;

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but the State Superintendent has not been constituted such a tribunal by law. Nor can this court try the issue of such fraud in this collateral proceeding. It may be that the Legislature could invest the State Superintendent with powers in this regard; but up to this time it has not seen fit so to do. The Legislature, no doubt, thought that it had sufficiently hedged these enumerations from fraud by the criminal proceedings which it authorized and mentioned above." (Id. at 44)

However, the State Board of Education is obligated to reduce a district's apportionment in the next school year by the amount of any state aid it improperly received in the current year. Section 163.091 provides as follows:

"Correction of errors in apportionment of state aid.--The state board of education may correct any error made in the apportionment of the state school moneys fund among the various counties of this state out of the state school moneys fund of the year next following the date when the mistake was made. The state board of education shall certify the amount set apart to any county for the purpose of correcting any error to the comptroller and to the county treasurer, and the comptroller shall certify the amount so apportioned for proper payment, and the county treasurer shall distribute and credit the funds to the various districts in the county as the funds of the year in which the error occurred. If any district has received funds in excess of the amount to which it was entitled, its apportionment for the next succeeding year shall be reduced accordingly." (Emphasis supplied)

This statute provides the sole remedy available to the state to recover from a school district an excess amount of state school money paid to the district in the current year. Therefore, if the district's application for state school money, report pursuant to Section 163.081 and calendar pursuant to Section 171.031 all indicate that the district is qualified for state aid in the current year, the district will receive its share of the state school money in the current year. In the following school year, the district's share of state school money will be reduced by the amount it received in the current year to which it was not entitled. However, should a school district amend any of these documents or otherwise

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officially notify the State Board of Education that the district is not qualified under Section 163.021 to receive state school money, the State Board of Education would then be obligated to adjust immediately the district's apportionment of school money. See Section 163.031.

CONCLUSION

Therefore, it is the opinion of this office that under the factual circumstances set forth in this opinion:

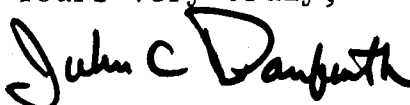
(1) Some or all of the teachers of the St. Charles School District may be placed on a leave of absence pursuant to the provisions of Section 168.124, RSMo 1969, of the Teacher Tenure Act, if the school board of the St. Charles School District reasonably concludes that such action is necessary due to the financial condition of the school district.

(2) In determining whether the schools of a district must close due to lack of funds, a school board must take into consideration all available income, including any school money received from the State of Missouri. However, a school board may consider any fixed expenses it will have after school is closed in determining when the available funds of the district have been exhausted.

(3) Section 163.091, RSMo 1969, provides the sole remedy available to the state to recover from a school district the excess amount of state school money paid to the district in the current year. Therefore, if the district's application for state school money, report pursuant to Section 163.081, RSMo 1969, and calendar pursuant to Section 171.031, RSMo 1969, as filed with the State Board of Education all indicate that the district is qualified for state aid in the current year, the district will receive its share of state school money in the current year. In the following school year, the district's share of state school money will be reduced by the amount it received in the current year to which it was not entitled. However, should a school district amend any of these documents or otherwise officially notify the State Board of Education in the current year that the district is not qualified under Section 163.021, RSMo 1969, to receive state school money, the State Board of Education would then be obligated to adjust immediately the district's apportionment of school money.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, D. Brook Bartlett.

Yours very truly,



JOHN C. DANFORTH
Attorney General

AIRPORTS:
REVENUE BONDS:
COOPERATIVE AGREEMENTS:
CITIES, TOWNS & VILLAGES:

The City of St. Louis may not issue and sell revenue bonds, and use the proceeds therefrom for the purpose of purchasing, constructing, extending or improving an airport to

be jointly owned by the City of St. Louis and the State of Illinois. The City of St. Louis, by ordinance, may use general tax revenues for such purpose. The City of St. Louis may not contribute its general tax revenues to the construction and operation of an airport of which it is not a joint owner. The consent of the Congress of the United States, if required, has been given to the proposed airport to be jointly owned by the City of St. Louis and the State of Illinois.

OPINION NO. 504

December 16, 1970

Honorable Robert A. Young
State Senator
District No. 24
State Capitol Building
Jefferson City, Missouri 65101



Dear Senator Young:

You have requested an opinion on several questions, which pertain to the proposed airport to be built and owned by the City of St. Louis and the State of Illinois.

You first inquire if the City of St. Louis can spend revenue bond monies or tax monies for this airport.

Article VI, Section 27, Constitution of Missouri provides:

"Any city or incorporated town or village in this state, by vote of four-sevenths of the qualified electors thereof voting thereon, may issue and sell its negotiable interest bearing revenue bonds for the purpose of paying all or part of the cost of purchasing, constructing, extending or improving any of the following: (1) revenue producing water, gas or electric light works, heating or power plants; (2) plants to be leased or otherwise disposed of pursuant to law to private persons or corporations for manufacturing and industrial development purposes, including the real estate, buildings, fixtures and machinery; or (3) airports; to be owned exclusively by the municipality, the cost of operation and maintenance

Honorable Robert A. Young

and the principal and interest of the bonds to be payable solely from the revenues derived by the municipality from the operation of the utility or the lease of the plant."

Section 305.200, RSMo 1969, provides in material part:

"1. Any county, city or city under special charter shall have the power to acquire by purchase, property for an airport or landing field or addition thereto, . . .

* * *

"3. The purchase price . . . for an airport or a landing field or any addition thereto may be paid for wholly or in part from the proceeds of the sale of bonds of such county, city or city under special charter as the governmental or legislative body of such county, city or city under special charter shall determine, subject, however, to the adoption of a proposition therefor at any election to be held in such county, city or city under special charter for such purpose; also to permit said municipality or municipalities mentioned in this section to issue revenue bonds for said above mentioned purpose on authority of the governing body of said municipality; provided, that no airport or landing field shall be established or located in any county, city or city under special charter in violation of any plan or master airport plan or zoning regulation restricting the location of an airport or landing field adopted by the planning commission of any such county, city or city under special charter."

The Charter of the City of St. Louis authorizes it to issue and sell revenue bonds "For the acquiring of land" and "for the purchase, construction, reconstruction or extension of . . . terminals, . . ." (Article XVII, §1, Charter of St. Louis).

That portion of Article VI, Section 27, Constitution of Missouri relating to airports is self-executing (i.e., requires no enabling legislation) (Petition of Monroe City, 359 S.W.2d 706, 710-711 (Mo. banc 1962)).

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" . . . Legislation may be enacted to implement and facilitate the operation of a constitutional provision without impairing those parts which are self-executing, but all such legislation must be subordinate to the constitutional provision and in furtherance of its purposes and must not tend to narrow or embarrass it. . . ." (Wring v. City of Jefferson, 413 S.W.2d 292, 301 (Mo. banc 1967))

The Supreme Court has ruled that Article VI, Section 27, Constitution of 1945, is not a limitation upon the power of the legislature with regard to municipal revenue bonds to finance projects not mentioned in the Constitution. City of Maryville v. Cushman, 249 S.W.2d 347 (Mo. banc 1952); Kansas City v. Fishman, 241 S.W.2d 377 (Mo. 1951). However, the court has also stated that the powers of the legislature are limited as to revenue bonds for those projects mentioned in Article VI, Section 27, Constitution of Missouri.

"Our conclusion is that Section 27, Article VI of the Constitution has no application to the bonds in this case. It is a fundamental principle of constitutional law that a State Constitution is not a grant of power as is the Constitution of the United States but, as to legislative power, it is only a limitation; and, therefore, except for the limitations imposed thereby, the power of the State Legislature is unlimited and practically absolute. (citations omitted). Thus this constitutional provision prohibits the Legislature from authorizing revenue bonds, for the purpose of paying for municipally owned water, gas or electric light works, heating or power plants or airports, which are not approved by vote of four-sevenths of the qualified electors. However, we agree with appellant that the proposed parking facility is not such a utility as contemplated by this constitutional provision; and, therefore, the Legislature has complete authority to authorize revenue bonds issued for that purpose. . . ." (Kansas City v. Fishman, 241 S.W.2d 377, 379 (Mo. 1951))

If the legislature could not reduce the percentage of voters required to approve municipal revenue bonds for airport construction, we believe it must likewise follow that the legislature cannot alter the constitutional requirement that the airport be exclusively owned by the municipality issuing the bonds.

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"If a constitutional provision is self-enforcing . . . it necessarily follows that a statute is unconstitutional which is more restrictive than a self-enforcing constitutional provision."
(*Vanlandingham v. Reorganized School Dist. R-IV*,
243 S.W.2d 107, 110 (Mo. 1951))

Since the Constitution conditions the use of municipal revenue bonds for airports upon the exclusive ownership of the airport by the municipality, it is our opinion that Section 305.200(3), RSMo, if such section were held to authorize less than exclusive ownership by the municipality issuing the revenue bonds, would be unconstitutional and that the City of St. Louis cannot use monies derived through the sale of revenue bonds to construct an airport it does not exclusively own.

However, we see no constitutional inhibitions upon the use by the City of St. Louis of tax monies to construct this jointly owned airport. Taxes may be collected and used by counties and cities for "county, municipal and other corporate purposes" (Article X, Section 1, Constitution of Missouri, 1945) and for "public purposes" (Article X, Section 3, Constitution of Missouri, 1945). Development and operation of an airport by the City of St. Louis outside its corporate limits using money derived through taxation is within these constitutional requirements. *Dysart v. City of St. Louis*, 11 S.W.2d 1045 (Mo. banc 1928); *McDonnell Aircraft Corporation v. City of Berkeley*, 367 S.W.2d 498, 509, 512 (Mo. 1963); *American Airlines Inc. v. City of St. Louis*, 368 S.W.2d 161, 164 (Mo. 1963). Therefore, we believe the City of St. Louis may use tax revenue to develop and operate an airport in the State of Illinois. (Section 305.240, RSMo; Article I, Section 1(8), Charter of St. Louis). We believe that the City of St. Louis presently has legislative authorization for financially participating in the construction of a City of St. Louis-State of Illinois airport in the State of Illinois if such airport is jointly owned by the City of St. Louis and the State of Illinois.

Your second question asks whether a consent of the U.S. Congress is necessary for the City of St. Louis to spend tax monies or monies from revenue bonds, in the State of Illinois.

The United States Constitution provides:

"No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State, . . ." (Article I, Section 10, Clause 3, Constitution of the United States)

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We have some doubt that this constitutional limitation upon agreements between states has any application to an agreement between one state and a city of another state (Cf. St. Louis & San Francisco Railway Company v. James, 161 U.S. 545, 561, 40 L.Ed. 802, 808 (1895)). However, assuming the limitation is relevant to the instant case, the Congress has given its consent in regard to bi-state airport compacts, and therefore, if such is required, we believe the City of St. Louis-State of Illinois has adequate congressional sanction.

"The consent of Congress is given to each of the several States to enter into any agreement or compact, not in conflict with any law of the United States, with any other State or States for the purpose of developing or operating airport facilities. The right to alter, amend, or repeal this section is expressly reserved. Pub.L. 86-154, Aug. 11, 1959, 73 Stat. 333." (49 U.S.C.A., Section 1103a)

Your third question is if the consent of the Missouri legislature is necessary to enable the City of St. Louis to spend tax monies or issue revenue bonds obligating the City of St. Louis, on property located in the State of Illinois and not owned by the City of St. Louis.

Since it is our view, as already stated, that the City of St. Louis is prohibited by the Missouri Constitution from using revenue bond proceeds to construct an airport not solely owned by the city, and that any statute purporting to authorize such expenditure would be unconstitutional, we shall consider this question only from the standpoint of "tax monies."

The legislature has heretofore authorized cities, including those under special charter to establish, construct, own, control, lease, equip, improve, maintain, and operate airports, either alone or jointly or concurrently with others (Section 305.170, RSMo), and the airport may be in an adjoining state (Section 305.240, RSMo). Therefore, by virtue of the Political Subdivision Cooperation Law, the City of St. Louis has authority from the legislature to contract with the State of Illinois for the planning, development, and construction of a public airport located in the State of Illinois (Section 70.220, RSMo). The City of St. Louis also has legislative authority to contract with the State of Illinois for the acquisition by purchase, gift, or eminent domain of lands necessary for an airport for the joint use of the contracting parties, and this land may be owned by the parties as tenants in common (Section 70.240, RSMo).

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However, we are unaware of any existing legislative authority for the City of St. Louis to contribute its tax revenues to the establishment and operation of an airport "not owned by the City of St. Louis." We think the above statutes contemplate and require that the City of St. Louis be a joint owner of the airport (Sections 70.240 and 305.170, RSMo) or at least own a leasehold interest in the airport (Section 305.170, RSMo).

Finally, you inquire if Mayor Cervantes can in any way commit city property, all or in part, to the State of Illinois, with or without the consent of the Board of Alderman of the City of St. Louis.

To the extent that your question inquires as to the power of the Mayor of the City of St. Louis to contract in behalf of the city without the enactment of an ordinance by the Board of Aldermen, we believe our views are adequately expressed in our Opinion No. 381, referred to above, and a copy of which is attached hereto.

The Mayor of the City of St. Louis, if a proper ordinance is enacted by the Board of Alderman, can commit municipal property to the State of Illinois for construction and operation of an airport subject to the limitations expressed in this opinion.


CONCLUSION

It is the opinion of this office that the City of St. Louis may not issue and sell revenue bonds, and use the proceeds therefrom for the purpose of purchasing, constructing, extending or improving an airport to be jointly owned by the City of St. Louis and the State of Illinois. It is further our opinion that the City of St. Louis, by ordinance, may use general tax revenues for such purpose. The City of St. Louis may not contribute its general tax revenues to the construction and operation of an airport of which it is not a joint owner.

In the opinion of this office, the consent of the Congress of the United States, if required, has been given to the proposed airport to be jointly owned by the City of St. Louis and the State of Illinois.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Louren R. Wood.

Yours very truly,


JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 381
6-19-70, Meyer

COUNTY BUILDINGS: The circuit court of a county cannot re-
COUNTIES: quire the county court to appropriate
COUNTY COURT: money for the repair of the county court-
house, or to order by mandamus or other
action the county court to repair the courthouse unless the county
court abused or arbitrarily exercised its discretion.

OPINION NO. 505

October 9, 1970

Honorable E. Richard Webber
Prosecuting Attorney
Scotland County
110 West Monroe Street
Memphis, Missouri 63555



Dear Mr. Webber:

This is in reply to your request for an official opinion of this office, which request reads as follows:

"A Schuyler County official has requested that I contact you for an opinion. In 1970, a new courthouse was built in Schuyler County, Missouri. Since that time, almost nothing has been spent by the county for maintenance and repair to the new building. It is in a very bad state of repairs at the present time. Plastering is loose in places, the roof leaks, the windows have not been painted and have rotted, the railing has rotted and is about to fall, and the entire building is generally in a bad state of repairs.

"First, does the circuit court judge have jurisdiction to require the county court to appropriate money for the repair of the courthouse? Second, can the prosecuting attorney by mandamus or other action require the county court to repair the courthouse?"

There are several statutes specifically relating to county buildings and the power of the county court which are pertinent to the inquiry.

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Section 49.310, RSMo 1969, reads in part as follows:

"The county court in each county in this state shall erect and maintain at the established seat of justice a good and sufficient courthouse, jail and necessary fireproof buildings for the preservation of the records of the county; except, that in counties having a special charter, the jail or workhouse may be located at any place within the county. In pursuance of the authority herein delegated to the county courts, the county courts may acquire a site, construct, reconstruct, remodel, repair, maintain and equip the courthouse and jail, and in counties wherein more than one place is provided by law for holding of court, the county court may buy and equip or acquire a site and construct a building or buildings to be used as a courthouse and jail, and may remodel, repair, maintain and equip buildings in both places "

Section 49.320, RSMo 1969, reads as follows:

"Whenever the county court of any county thinks it expedient to erect any of the buildings aforesaid, the building of which is not otherwise provided for, and there are sufficient funds in the county treasury for that purpose, not otherwise appropriated, or the circumstances of the county will otherwise permit, they shall make an order for the building thereof, stating in the order the amount to be appropriated for that purpose."

Section 49.470, RSMo 1969, reads as follows:

"The county court of each county shall have power, from time to time, to alter, repair or build any county buildings, which have been or may hereafter be erected, as circumstances may require, and the funds of the county may admit; and they shall, moreover, take such measures as shall be necessary to preserve all buildings and property of their county from waste or damage."

Section 49.510, RSMo 1969, reads as follows:

"It shall be the duty of the county to provide offices or space where the officers of the county may properly carry on and perform the duties and functions of their respective offices."

Honorable E. Richard Webber

Said county shall maintain, furnish and equip said offices and provide them with the necessary stationery, supplies, equipment, appliances and furniture, all to be taken care of and paid out of the county treasury of said county at the time and in the manner that the county court may direct."

Thus, the county court has the power and duty to erect and maintain a sufficient county courthouse and to provide offices or space to the county officers to carry out their duties.

The power to erect a courthouse under Section 49.320 is discretionary in the county court, Decker, et al, v. Deimer, et al, 229 Mo.296, 129 S.W.936,944 (1910); and this discretion cannot be controlled by mandamus. State ex rel. Howell County v. Howell County Court Justices, 58 Mo.583 (1875). In the Howell County Court Justices case the court stated the plaintiff's allegations, l.c. 584:

" . . . It was averred, that the court house in the county was a poor and insufficient building, and that it would be greatly advantageous to have a better one; . . . "

The court said, l.c. 585:

" . . . This law leaves the erection of the buildings entirely to the sound discretion and judgment of the County Court, and that discretion cannot be controlled by mandamus."

In Vitt v. Owens, et al., 42 Mo.512 (1868), the circuit court attempted to enjoin the county court from making certain repairs to the county courthouse. The presiding judge of the county court sought prohibition against the circuit court. The Supreme Court said, l.c. 513,514:

" . . . The County Courts have an exclusive jurisdiction over the subject of repairs of county buildings and the removal of the seat of justice. . . . These matters belong to the administrative and ministerial functions of the County Courts, and not to the judicial branch of their jurisdiction; and for this reason it has been decided that even a prohibition will not lie from the superior courts of justice to restrain them from proceeding in such matters according to their own judgment and discretion. . . . In this matter of repairs, the County Court was proceeding, of its own motion, in the exercise of its proper jurisdiction, and there were no parties to any suit at law. It is true that in proceedings of this nature, where there is no

Honorable E. Richard Webber

appeal or writ of error, the Circuit Courts have a superintending control over the County Courts, which may be exercised in certain cases and in a proper way, according to the usages and principles of law. . . . It might be exercised in a proper case by mandamus. . . . But where the whole subject is placed under the exclusive jurisdiction of the County Court, and involves the public interest and convenience alone, as in the matter of establishing or vacating public roads, it has been held that a mandamus will not lie from the Circuit Court. . . . We need not undertake to define in what cases the Circuit Court might interfere by mandamus. . . . "

There are certain inherent powers of the circuit courts to provide themselves with necessities. The Supreme Court in *State ex rel. Gentry et al., v. Becker, et al.*, 351 Mo.769, 174 S.W.2d 181, 183 (1943) stated the general rule as follows:

" . . . 'The courts have the inherent power and authority to incur and order paid all such expenses as are (reasonably) necessary for the holding of court and the administration of the duties of courts of justice.' . . . The limitation on the courts' inherent power is that the expense incurred or the thing done must be reasonably necessary to preserve the courts' existence and protect it in the orderly administration of its business. . . . "

See also *State of Missouri ex rel. McNeil*, 42 Mo.496 (1868).

Furthermore, there is the duty of the county to provide offices or space for the county officers to perform their duties. Section 49.510, *supra*. We believe that it may reasonably be inferred from Section 49.510 that the office or space which the county must provide must be adequate and adaptable to the purposes of the officer for whom it is provided. However, it is the county court which initially determines such questions of adequacy and suitability. As was said in *Buchanan v. Ralls County*, 283 Mo.10, 222 S.W.1002,1004 (1920), wherein the suitability of office space provided to a county treasurer was in issue:

" . . . whether or not such room was reasonably suitable room for respondent's use, under the circumstances, becomes a question of fact, unless, in the light of the evidence, the impracticability or unsuitableness of such an arrangement is so obvious that the minds of reasonable men could not honestly differ about it. . . . "

Honorable E. Richard Webber

In *Bradford v. Phelps County, Mo.* S.Ct., 210 S.W.2d 996, 1001 (1948), the Missouri Supreme Court said:

" . . . It seems the county court's exercise of its discretion in the performance of its statutory and discretionary duty should not be interfered with, vacated or set aside, except in a case where it is clear the county court in acting abused or arbitrarily exercised its discretion (or, if such were the charge, acted fraudulently or corruptly)."

It is clear, therefore, that the circuit court does not have inherent or statutory power to order the building of a county courthouse. Nor do we think that the circuit court can order by mandamus or otherwise the county court to repair or appropriate money to repair the county courthouse, unless the county court abused or arbitrarily exercised its discretion.

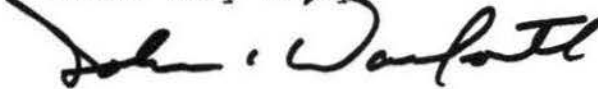
Under the facts presented it does not appear that the repairs listed are reasonably necessary to preserve the circuit court's existence, nor does it appear that the county court abused or arbitrarily exercised its discretion.

CONCLUSION

Therefore, it is the opinion of this office that the circuit court of a county cannot require the county court to appropriate money for the repair of the county courthouse, or to order by mandamus or other action the county court to repair the courthouse unless the county court abused or arbitrarily exercised its discretion.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Walter W. Nowotny, Jr.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

JOHN C. DANFORTH
Attorney General

September 29, 1970

Answered by - Voigts
OPINION LETTER NO. 507

Honorable Fred W. Meyer
State Representative
District No. 104
Route #3
Wentzville, Missouri 63385



Dear Representative Meyer:

This is in response to your request for an opinion of this office with respect to the following inquiry:

"A recent opinion issued by Attorney General John Danforth has influenced many voters in the Wentzville R-IV School District to vote against a proposed school levy. Our Board of Education has determined that school cannot open unless a levy is approved. The district has no reserve funds to finance the opening of school before a levy is approved by the voters.

"Finally, as long as the district is not assured of being able to complete 180 days of school, the Board of Education is not in a position to accept State Apportionment and thereby obligate the district to repay the State Aid next year.

Honorable Fred W. Meyer

"Many voters now disregard the explanation of the districts fiscal crisis as explained by the Board of Education because of the Attorney General's recent opinion.

"Because of the Wentzville Districts unique fiscal situation, it would be helpful if the Attorney General would issue a public statement in particular reference to the Wentzville District to make it clear that approval of a levy is the only assurance that public schools can be opened and sustained for 180 days in the Wentzville RIV District."

The opinion to which you refer is Attorney General Opinion No. 446, Esser, September 4, 1970, copy enclosed. That opinion, which stated the law applicable to a given factual situation, held that:

"If all available funds are insufficient to provide for a full nine month term, the school board may refuse to open the schools within its district if it has arranged for all pupils within the district to be educated in another district. If such arrangements are not or cannot be made, then the school board must open and operate its schools until all financial resources are exhausted. When all financial resources have been exhausted, the school board is authorized to close its schools."

Although you have provided us with various data concerning the school district's finances, we decline to make an evaluation of that data and the financial condition of the school district as demonstrated thereby. Such is unnecessary since you state the district's financial condition is such that there are insufficient funds to open the schools for any period of time, however short.

You state a question has arisen as to the interpretation of the statement in our previous opinion that, "the school board must open and operate its schools until all financial resources are exhausted." A school district need not expend the last penny in its account before it is authorized to close its schools for lack of funds. Whether a school must be closed due to lack of funds is a decision which has been entrusted by the Missouri Constitution and statutes to the reasonable discretion of the school board of

Honorable Fred W. Meyer

a district. In reaching this decision a board might take into consideration the amount of money required to provide for certain fixed expenses of the district such as maintenance and security of the district's buildings and other property, insurance premiums, debt service, and any other fixed expenses or charges which are or will be due and payable during the current school year, even though the schools are not in actual operation. These are some of the factors which the board might consider in determining whether all available financial resources have been exhausted so as to warrant the closing of the schools, or, in some situations, warrant decision not to open the schools for any period of time, however short.

If the school board has reasonably determined that there are insufficient available funds to provide for the opening of school for any period of time, however short, the district is not obligated to open its schools. The school district is not required to do that which is financially impossible.

Your inquiry with respect to the apportionment of state funds is answered by the Opinion of the Attorney General, No. 501, Meyer, issued this date. A copy of that opinion is enclosed.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosures:

Op. No. 446
9-4-70, Esser

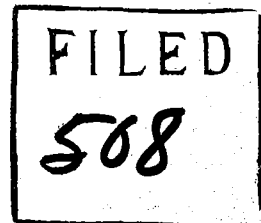
Op. No. 501
9-29-70, Meyer

Answer by Letter (Klaffenbach)

October 2, 1970

OPINION LETTER NO. 508

Honorable Arlie H. Meyer
State Representative
District 105
234 Thomas
St. Charles, Missouri 63301



Dear Representative Meyer:

This letter is in response to your request for an opinion concerning an interpretation of Section 304.120, RSMo 1969.

We understand that your question is whether a city limits sign must be posted with the speed limit sign required by Section 304.120, RSMo 1969.

Section 304.120 states in part:

"Municipalities, by ordinance, may establish reasonable speed regulations for motor vehicles within the limits of such municipalities. No person who is not a resident of such municipality and who has not been within the limits thereof for a continuous period of more than forty-eight hours, shall be convicted of a violation of such ordinances, unless it is shown by competent evidence that there was posted at the place where the boundary of such municipality joins or crosses any highway a sign displaying in black letters not less than four inches high and one inch wide on a white background the speed fixed by such municipality so that such sign may be clearly seen by operators and drivers from their vehicles upon entering such municipality."

Honorable Arlie H. Meyer

In our view this section requires only that a sign indicating the municipality's speed limit be placed at such boundary and it does not require that the boundary itself be identified. However, in view of modern traffic conditions, it would appear prudent and a courtesy to the motorist to identify the municipality on the sign designating the speed limit at the boundaries of such municipality.

Very truly yours,

JOHN C. DANFORTH
Attorney General

DISABILITY BENEFITS: The additional proviso respecting
FIRE PROTECTION DISTRICTS: the payment of health, accident or
 disability benefits to salaried mem-
bers of the organized fire department of a fire protection district
in a first class county who shall become disabled due to injury or
disease incurred while on duty or in the performance of their duties,
must be submitted to the voters and approved by them even though the
voters have previously approved pensions and death benefits.

OPINION NO. 511

October 6, 1970

Honorable E. J. Cantrell
State Representative
District No. 33
3406 Airway
Overland, Missouri 63114



Dear Representative Cantrell:

This official opinion is in response to your request which is
as follows:

"House Bill No. 334 passed by the legislature
in 1969 is part of Section 321.600. It adds
to the already existing Sub-Section 15 as fol-
lows:

(and to provide for the payment of
health, accident or disability bene-
fits to such salaried members of its
organized fire department, who shall
become disabled due to injury or dis-
ease incurred while on duty or in the
performance of their duties; except
that no board shall have the authority
herein set forth until approved by the
qualified voters of the districts con-
cerned as herein provided.)

"The voters in the Community Fire Protection
District in St. Louis County previously approved
the requirements of the first proviso in this
section. The question is, having obtained the
voters approval on the first proviso, is the
additional proviso applicable and authorized
without submitting to the voters anew?"

Honorable E. J. Cantrell

Section 321.220, RSMo 1959, set forth the powers, authority and privileges which could be exercised by the board of directors of a fire protection district. That section related to the powers, authority and privileges of a board of a fire protection district in class one counties. The provisions relating to fire protection districts in class two, three and four counties were contained in Sections 321.510 through 321.715, RSMo 1959.

House Bill No. 356, 73rd General Assembly, was an act to repeal Sections 321.180 and 321.190, RSMo 1959, and Sections 321.010 and 321.220, RSMo Supp. 1963, relating to fire protection districts and to enact in lieu thereof four new sections, relating to the same subject. That act, insofar as here relevant, provided, in part, as follows:

"For the purpose of providing fire protection to the property within the district, the district and, on its behalf, the board shall have the following powers, authority and privileges:

* * *

"(15) To provide for the pensioning of the salaried members of its organized fire department of the district and to provide for the payment of death benefits to the widows and minor children of members of its organized fire department who lose their lives in the performance of their duties; except that no board shall have the authority herein set forth until approved by the qualified voters of the districts concerned as herein provided. On order of the board of a district or on petition of twenty-five qualified voters who are real property owners within the district, an election shall be held on the question of whether the authority of this subdivision shall be exercised by the board and the secretary shall cause to be published notice of the election as herein provided and shall cause to be submitted to the qualified voters of the district at the next annual election of the members of the board or at a special election called for the purpose a separate ballot containing the question:

Shall the board of directors of _____
fire district have the authority to _____

Honorable E. J. Cantrell

provide for the pensioning of the salaried members of the organized fire department and to provide for the payment of benefits to the widows and minor children of members of the fire department who lose their lives in the performance of their duties?

Yes _____

No _____

(Check one)

"If a majority of the qualified voters casting votes thereon at the election be in favor of the question, this subdivision shall take effect in the district forthwith and the board shall then and thereafter effect such a program for the pension and benefit payments authorized at the election as shall be necessary for the operation of the district. Notice of every election under this subdivision shall be published on the same day of the week, once each week for three consecutive weeks in a newspaper of general circulation in the county in which the district is located, the last publication to be not more than three nor less than two weeks preceding the election. The proposition authorized by this subdivision shall in no case be referred to the voters more than one time in any twelve-month period."

It should be noted that under the statutory arrangement as it existed at that time, this bill applied only to fire protection districts in first class counties.

Proposed legislation concerning five protection districts was introduced at the 75th General Assembly. Senate Committee Substitute for House Bill No. 322 was an act to repeal Sections 321.020, 321.080, 321.100, 321.110, 321.120, 321.130, 321.210, 321.270, 321.300, 321.350, 321.360, 321.370, 321.390, 321.410, 321.420, 321.430, 321.440, 321.450, 321.510, 321.515, 321.525, 321.530, 321.535, 321.540, 321.545, 321.550, 321.555, 321.560, 321.565, 321.570, 321.575, 321.580, 321.585, 321.590, 321.595, 321.600, 321.605, 321.610, 321.615, 321.620, 321.625, 321.630, 321.635, 321.640, 321.645, 321.650, 321.655, 321.660, 321.665, 321.670, 321.675, 321.680, 321.685, 321.690, 321.695, 321.700, 321.705, 321.710, and 321.715, RSMo 1959, and Sections 321.010, 321.220, 321.240, 321.320, 321.460, 321.465 and 321.520, RSMo Supp. 1967,

Honorable E. J. Cantrell

relating to fire protection districts, and to enact in lieu thereof twenty-eight new sections relating to the same subject.

Section 321.220, of that bill, provided, in part, as follows:

"For the purpose of providing fire protection to the property within the district, the district and, on its behalf, the board shall have the following powers, authority and privileges:

* * *

"(15) To provide for the pensioning of the salaried members of its organized fire department of the district and to provide for the payment of death benefits to the widows and minor children of members of its organized fire department who lose their lives in the performance of their duties; except that no board shall have the authority herein set forth until approved by the qualified voters of the districts concerned as herein provided. On order of the board of a district or on petition of twenty-five qualified voters who are real property owners within the district, an election shall be held on the question of whether the authority of this subdivision shall be exercised by the board, and the secretary shall cause to be published notice of the election as herein provided and shall cause to be submitted to the qualified voters of the district at the next annual election of the members of the board or at a special election called for the purpose a separate ballot containing the question:

Shall the board of directors of _____ fire district have the authority to provide for the pensioning of the salaried members of the organized fire department and to provide for the payment of benefits to the widows and minor children of members of the fire department who lose their lives in the performance of their duties? . . ."

House Committee Substitute for House Bill No. 334, 75th General Assembly, was an act to repeal Sections 321.220 and 321.240, RSMo

Honorable E. J. Cantrell

Supp. 1967, relating to fire protection districts and to enact in lieu thereof two new sections relating to the same subject. Insofar as here relevant, Section 321.220 of that act provided, in part, as follows:

"For the purpose of providing fire protection to the property within the district, the district and, on its behalf the board, shall have the following powers, authority and privileges:

* * *

"(15) To provide for the pensioning of the salaried members of its organized fire department of the district and to provide for the payment of death benefits to the widows and minor children of members of its organized fire department, or if such member is unmarried or without minor children, to his next of kin, including adult children, if any, or other person designated by him or his estate, who lose their lives while on duty; and to provide for the payment of health, accident or disability benefits to such salaried members of its organized fire department, who shall become disabled due to injury or disease incurred while on duty or in the performance of their duties; except that no board shall have the authority herein set forth until approved by the qualified voters of the districts concerned as herein provided. On order of the board of a district or on petition of twenty-five qualified voters who are real property owners within the district, an election shall be held on the question of whether the authority of this subdivision shall be exercised by the board, and the secretary shall cause to be published notice of the election as herein provided and shall cause to be submitted to the qualified voters of the district at the next annual election of the members of the board or at a special election called for the purpose a separate ballot containing the question:

Shall the board of directors of _____ fire district have the authority to provide for the pensioning of the salaried members of the organized fire department and to provide for the payment of benefits to the widows and minor children of

Honorable E. J. Cantrell

members of the fire department, or if such member be unmarried or without minor children, to his next of kin, including adult children, if any, or other person designated by him, or his estate, who lose their lives while on duty; and to provide for the payment of health, accident or disability benefits to such salaried members of its organized fire department who shall become disabled due to injury or disease incurred in the performance of their duties? . . ."

It should be noted that the reviser of statutes elected to insert House Bill No. 334 as Section 321.600, RSMo 1969, and considered that it applied only to the powers of boards in first class counties, and did not consider that such bill was applicable to Section 321.220, RSMo 1969, which now defines the board's authority in all counties. The apparent reason for this is that Section 321.220, RSMo Supp. 1967, related to the powers of a fire protection district board in first class counties and the reviser considered House Bill No. 334 to broaden the board's powers only with respect to first class counties. The propriety of the reviser's action is not significant to the resolution of your inquiry, since St. Louis County is a first class county, and there is no question as to the application of this provision to first class counties. It is not necessary to here pass upon the application of the act to second, third and fourth class counties.

In your opinion request, you advise that the voters of the Community Fire Protection District in St. Louis County have previously approved the pensioning and death benefits provision as it existed prior to the adoption of House Bill No. 334. The adoption of House Bill No. 334 substantially broadened the authority of the board, upon voter approval, to also provide for health, accident or disability benefits as is reflected in the form of ballot which is required. That ballot now is in the following form:

"Shall the board of directors of fire district have the authority to provide for the pensioning of the salaried members of the organized fire department and to provide for the payment of benefits to the widows and minor children of members of the fire department, or if such member be unmarried or without minor children, to his next of kin, including adult children, if any, or other person designated by him, or his estate, who lose

Honorable E. J. Cantrell

their lives while on duty; and to provide for the payment of health, accident or disability benefits to such salaried members of its organized fire department who shall become disabled due to injury or disease incurred in the performance of their duties? . . ."

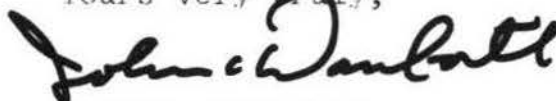
It is the opinion of this office that the voters must approve the payment of health, accident or disability benefits to such salaried members of its organized fire department who shall become disabled due to injury or disease incurred in the performance of their duties, even though they have previously approved provisions for pension and death benefits. The provision for voter approval may not be ignored because after having once approved pensions and death benefits the legislature then broadens the nature of benefits which the board could provide upon voter approval. A grant of authority to a board which can be made only upon a vote of the people may not, by subsequent legislative action, result in a substantial increase in that grant of authority without voter approval under these circumstances.

CONCLUSION

Therefore, it is the opinion of this office that the additional proviso respecting the payment of health, accident or disability benefits to salaried members of the organized fire department of a fire protection district in a first class county who shall become disabled due to injury or disease incurred while on duty or in the performance of their duties, must be submitted to the voters and approved by them even though the voters have previously approved pensions and death benefits.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Gene E. Voigts.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Answer by letter, Blackmar, A.

October 1, 1970

OPINION LETTER NO. 512

Honorable Allen S. Parish
Prosecuting Attorney
Saline County Court House
Marshall, Missouri 65340



Dear Mr. Parish:

This letter is in response to your request for an opinion where you ask the following:

"Candidate A is candidate for the office of Prosecuting Attorney. Candidate B was a Candidate for Probate Judge. Candidate B died on September 16, 1970. Both Candidates were running unopposed. May Candidate A, who has not withdrawn from the Prosecutor's race in accordance with Section 120.375, RSMo 1969, now be considered for, and nominated as, Probate Judge? If so, whose name should appear on the ballot as candidate for Prosecuting Attorney?"

Section 120.550, RSMo 1969, provides the procedure to be followed when a candidate dies after the primary but prior to the election. The portions of that statute relevant to your inquiry are as follows:

"1. The party committee of the county, . . . shall have authority to make nominations . . .

"(2) When any person nominated as the party candidate for any office shall die or resign before election;"

Honorable Allen S. Parish

Under that section, no declaration of candidacy by the individual nominated is necessary.

Section 120.370, RSMo 1969, provides that, "[n]o person shall file a written declaration of candidacy for more than one office to be filled at the next general election," Inasmuch as Candidate A, if he were nominated by the county committee as a candidate for probate judge, would not personally file a declaration of candidacy for that office, he would not come within the prohibition of Section 120.370, RSMo 1969. Therefore, we find no reason why Candidate A may not be nominated as his party's candidate for probate judge.

Your second question is, " . . . whose name should appear on the ballot as candidate for Prosecuting Attorney?". Here it appears that Section 120.375, RSMo 1969, provides the exclusive method by which a candidate may withdraw. That section reads:

"1. Any person who has filed a declaration of candidacy or any person nominated in the August primary election by his party as a candidate for an elective office, who wishes to withdraw as a candidate, must do so by filing a written, sworn statement of withdrawal in the office in which his original declaration of candidacy was filed not later than forty-five days prior to the day of the primary or general election, as the case may be.

"2. The name of a person who has properly filed a declaration of candidacy, or of a person nominated by his party for office, who has not given notice of withdrawal as provided in subsection 1, shall, except in case of death, be printed on the official primary or general election ballot, as the case may be."

Inasmuch as the time deadline has passed for withdrawal, Candidate A may not cause his name to be removed as candidate for prosecuting attorney. Therefore, if Candidate A is nominated for probate judge by the party committee, his name will appear on the ballot as a candidate for both the office of probate judge and prosecuting attorney.

Yours very truly,

JOHN C. DANFORTH
Attorney General

CONSTITUTIONAL LAW:
SCHOOLS:

The amount of indebtedness which may be incurred by a school district is determined on the basis of a calendar year rather than a fiscal year.

OPINION NO. 516

October 9, 1970

Honorable Ralph Breidenstein
Prosecuting Attorney
Clark County Court House
Kahoka, Missouri 63445



Dear Mr. Breidenstein:

This is in response to your request for an opinion of this office with respect to the following inquiry:

"Can a consolidated six-director school district legally borrow funds for the payment of currently operating expenses if the total amount of any such loan does not exceed the amount of anticipated revenues for the fiscal year in which the loans are made?" (Emphasis added)

Borrowing of funds by a school district must conform with the limitations as stated in Article VI, Section 26(a), Constitution of Missouri, 1945, which provides:

"No county, city, incorporated town or village, school district or other political corporation or subdivision of the state shall become indebted in an amount exceeding in any year the income and revenue provided for such year plus any unencumbered balances from previous years, except as otherwise provided in this Constitution." (Emphasis added)

Answer to your question is dependent upon whether the phrase "for such year" as found in the Constitution refers to a calendar year or a fiscal year. The Supreme Court of Missouri has consistently interpreted the constitutional phrase "for such year" to mean a

Honorable Ralph Breidenstein

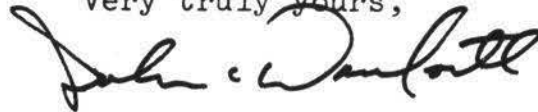
calendar year and not a fiscal year. First Nat. Bank of Stoutland v. Stoutland Sch. Dist., 319 S.W.2d 570 (Mo. 1958); Clarence Special School Dist. v. School Dist. No. 67, 107 S.W.2d 5, 7 (Mo. 1937); Linn Consol. H. Sch. Dist. v. Pointer's Creek Pub. Sch. Dist., 203 S.W.2d 721 (Mo. 1947).

CONCLUSION

Therefore, it is the opinion of this office that the amount of indebtedness which may be incurred by a school district is determined on the basis of a calendar year rather than a fiscal year.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Gene E. Voigts.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

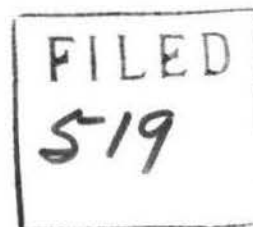
MOTOR VEHICLES:

A commercial motor vehicle used by the owner or operator to deliver limestone to farms owned or leased by other persons more than twenty-five miles beyond the municipal area where the operation is based, is not a "local commercial vehicle" within the meaning of Section 301.010(12), RSMo 1969.

December 9, 1970

OPINION NO. 519

Honorable George J. Pruneau
Prosecuting Attorney
Wayne County
100 North Main Street
Piedmont, Missouri 63957



Dear Mr. Pruneau:

This official opinion is rendered pursuant to request contained in your letter concerning the meaning of Section 301.010(12), RSMo 1969, defining "local commercial vehicle."

The facts presented in your letter may be stated as follows:

"The owner and operator of an agricultural limestone pit uses its own commercial motor vehicles to transport agricultural limestone from its 'lime pit' to all points and places within the State of Missouri. Orders are received from farm owners or managers and the agricultural limestone is taken directly from the lime pit to the farm, and then spread from the commercial motor vehicle to the land of the farm owner. No other commodity is transported in the commercial motor vehicle. The owner or manager of the farm pays for the agricultural limestone at the time it is delivered and spread."

The question is whether or not a vehicle used in delivering limestone under the described circumstances is a "local commercial motor vehicle" as defined by the statute.

The pertinent parts of the statute read as follows:

Section 301.010, RSMo, 1969.

Honorable George J. Pruneau

"(3) 'Commercial motor vehicle', a motor vehicle designed or regularly used for carrying freight and merchandise, or more than eight passengers;"

* * *

"(12) 'Local commercial motor vehicle', a commercial motor vehicle whose operations are confined solely to a municipality and that area extending not more than twenty-five miles therefrom, or a commercial motor vehicle whose property carrying operations are confined solely to the transportation of property owned by any person who is the owner or operator of such vehicle, to or from a farm owned by such person or under his control by virtue of a landlord and tenant lease; provided that any such property transported to any such farm is for use in the operation of such farm;"

The statute makes it clear that in order to qualify as a "local commercial motor vehicle" (1) the operation of the vehicle must be confined to a municipality and an area not extending more than twenty-five miles therefrom, or (2) its operations must be confined solely to transportation of the vehicle owner's or operator's property to or from a farm owned or leased by such person.

The facts in this case are that the vehicle operates beyond the twenty-five mile limit and deliveries are made to farms not owned or leased by the owner of the vehicle. Under these circumstances, the vehicle is not within the statutory definition contained in Section 301.010(12), RSMo 1969.

There seems to be no question but that a motor vehicle designed and used for hauling agricultural limestone would be a "commercial motor vehicle" within the meaning of Section 301.010(3), RSMo 1969.

A prior opinion of this office, i.e., Attorney General Opinion No. 364, issued on October 16, 1969, to Mr. E. I. Hockaday, Superintendent, Missouri State Highway Patrol, involves a construction of the statute under consideration here on a different factual basis. A copy of this opinion is enclosed for your further information.

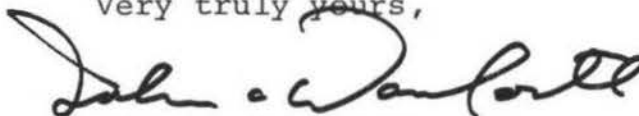
CONCLUSION

It is the opinion of this office that a commercial motor vehicle used by the owner or operator to deliver limestone to farms owned or leased by other persons more than twenty-five miles beyond the municipal area where the operation is based, is not a "local commercial vehicle" within the meaning of Section 301.010(12), RSMo 1969.

Honorable George J. Pruneau

The foregoing opinion, which I hereby approve, was prepared
by my assistant, John E. Park.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a stylized "D".

JOHN C. DANFORTH
Attorney General

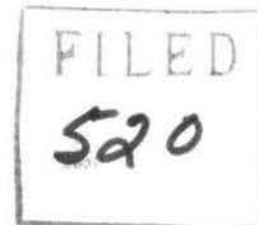
Enclosure
OP.364-Hockaday-1969

Answer by Letter (Klaffenbach)

November 18, 1970

OPINION LETTER NO. 520

Honorable Robert Payne
Assistant Prosecuting Attorney
Buchanan County Court House
St. Joseph, Missouri 64501



Dear Mr. Payne:

This letter is in answer to your opinion request concerning whether a woman who received alimony judgment in a fixed amount in a divorce action in Buchanan County can bring an action under the provisions of Chapter 454, the uniform support of Dependent's Law, Missouri being the initiating state and Arkansas the responding state. We are further advised that the primary question involved is whether this reciprocal law applies to alimony judgment.

We are enclosing Opinion Letter No. 491 involving the uniform law and you will note in that instance we did not issue an official opinion for the reason that the matter was pending before the court. We adhere to the policy expressed in that letter and for the same reason will not issue an official opinion in this instance. You will note however, from the memorandum of law enclosed that we held on page 3 that it was our view that the support law may be employed by a wife against her former husband to collect back alimony awarded her by judgment of a foreign state. We adhere to the view expressed in Davidson v. Davidson, 405 P2 261 (1965) in which the Supreme Court of Washington held that the reciprocal support acts (of California and Washington) may be invoked by an ex-wife to compel the appearance of her ex-husband in a court of the responding state to determine her rights and need of support and his duty of support, if any, and "This without reference to any amount indicated or obligation, if any, to pay

Honorable Robert Payne

the same under the divorce degree." While it is clear that the court in the Davidson case disregarded the amount fixed by the court in the sister state for alimony and considered it only as an advisory finding of the obligor's duty of support and the obligee's entitlement thereto and not binding we do not reach the conclusion that every responding state under the uniform act must consider the alimony judgment as only "advisory". That is "the duty of support" under Section 454.020(3), RSMo 1969, includes any duty of support imposed by any court order. The court did not consider in the Davidson case whether the alimony judgment of the sister state was entitled to full faith and credit or the application of Section 454.280, RSMo 1969 (or like statutes), which provides that no order of support of the responding state shall supercede any other order of support. These questions were, however, considered in the Iowa case of Moore v. Moore, 107 N.W.2d 97 (1961) cited as authority in the Davidson decision.

However, as we indicated we support the proposition in the Davidson case that (in an instance such as this) the ex-wife has a duty of support owing to her which can be enforced under the uniform act although we do not speculate at this time as to what effect the Arkansas responding state court will give to the amount of alimony which Missouri has determined to be the amount of support due the obligee.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosure:

Opinion Letter No. 491
12-21-66, Potashnick

October 26, 1970

Answered by Letter - Klaffenbach
OPINION LETTER NO. 522

Honorable William G. Johnson
Prosecuting Attorney
Morgan County Court House
103 South Monroe
Versailles, Missouri 65084



Dear Mr. Johnson:

This letter is in response to your opinion request in which you ask:

"Upon occasion the Morgan County Judge of Probate and ex officio Magistrate is called into adjoining counties pursuant to Rule 23.05, Rules of the Supreme Court of Missouri.

"Will you kindly advise the appropriate method for such officer to obtain reimbursement and travel expenses and such other allowances as may be due him in connection with such performance of official duties in adjoining counties?"

Supreme Court Rule 23.05 states:

"If the magistrate is disqualified as provided in Rule 23.04, or if the magistrate disqualifies himself, he shall set the examination down for hearing on some date within ten days after the affidavit

Honorable William G. Johnson

is filed, and shall notify and request some other magistrate in the county (but not a judge of a court having original jurisdiction to try felonies), if there be one, or if not some magistrate in an adjoining county, to conduct the examination in the court where the complaint is pending; and it shall be the duty of the magistrate so requested to appear at the time and place appointed for said examination, and he shall proceed with the same in like manner as if the complaint had originally been brought before him."

Section 544.300, RSMo 1969 which is similar in context to Supreme Court Rule 23.05 and additionally provides for reimbursement of certain expenses of the magistrate temporarily transferred, states:

"If the magistrate is disqualified as provided in section 544.290, he shall set the examination down for hearing on some date within ten days after the affidavit is filed, and shall notify and request some other magistrate in the county, if there be one, or if not, some magistrate in an adjoining county, to conduct the examination at the office of the magistrate where the complaint is filed; and it shall be the duty of the magistrate so requested to appear at the time and place appointed for said examination, and he shall proceed with the same in like manner as if the complaint had originally been brought before him' provided however, that no judge of the circuit court nor any of the appellate courts of this state shall be requested to conduct such examination. When a magistrate appears and conducts an examination as herein provided, his actual traveling expenses at a rate not to exceed five cents per mile and his actual subsistence expense at a rate not to exceed five dollars per day shall be allowed him and shall be taxed as costs in the case and shall be paid as other costs incurred on behalf of the state."

Honorable William G. Johnson

Therefore, it is clear that Section 544.300 applies directly to the situation that you have in question.

We note that in the present situation, the transfer is not made by the Supreme Court. Probate and ex officio magistrate judges temporarily transferred or assigned by the Supreme Court receive their expenses pursuant to and as provided in Section 481.190, RSMo 1969 which provides:

"Any probate judge and ex officio magistrate when temporarily transferred or assigned by the supreme court to serve as a judge of a probate court and magistrate of a county other than the one to which he is appointed or elected shall be reimbursed for his expenses in the amount of five cents a mile for each mile traveled in going from the place of his residence to and returning from the place where such probate or magistrate court is held and for his subsistence in the amount of ten dollars per day for each day so engaged. Such expenses shall be paid monthly by the state from the magistrate fund upon the certification of the probate judge or magistrate so transferred or assigned."

Therefore a judge transferred under the provisions of Supreme Court Rule 23.05 is allowed such expenses which shall be taxed as costs in the case and paid as other costs, whereas a probate and ex officio magistrate judge temporarily transferred or assigned by the Supreme Court receives such expenses by the state from the magistrate fund upon the certification of such judge.

With respect to the mileage provisions contained in both Sections 544.300 and 481.190, we call your attention to Section 33.095, RSMo 1969, which was recently enacted by the Seventy-fifth General Assembly. Section 33.095 states:

"Other provisions of law notwithstanding, in every instance where an officer or employee of the state or any county, except first class counties with a charter form of government, is paid a mileage allowance or reimbursement, the allowance or reimbursement shall be computed at the rate of ten cents per mile unless a higher rate is specifically authorized by statute or order of the comptroller."

Honorable William G. Johnson

It is our view that Section 33.095 expressly supercedes the mileage provisions of Sections 544.300 and 481.190 and as a result thereof such magistrate is authorized a mileage allowance computed at the rate of ten cents per mile. Therefore, the mileage to be taxed under Section 544.300 is to be at the rate of ten cents per mile and the mileage to be paid out of the magistrate fund under Section 481.190 is also to be at the rate of ten cents per mile.

Obviously, both of the latter sections differ with respect to subsistence in that Section 544.300 authorizes actual subsistence expenses at a rate not to exceed five dollars to be taxed in the case and, Section 481.190 authorizes a flat subsistence rate of ten dollars per day.

Additionally, with respect to the mileage provisions that we have noted, we wish to point out that when, as in Section 544.300 such officer is allowed to tax such mileage as an item of reimbursable expense to him, the situation is quite different from that upon which we passed in our Opinion No. 449, dated October 16, 1969, to the Honorable John C. Vaughn, Director, Division of Budget and Comptroller, copy enclosed, in which we distinguished a sheriff's taxation of mileage which was not to be retained by him personally, but was required to be paid into the county treasury and, held that Sections 33.095 did not apply in such a situation.

Very truly yours,

JOHN C. DANFORTH
Attorney General

BONDS:

BAIL:

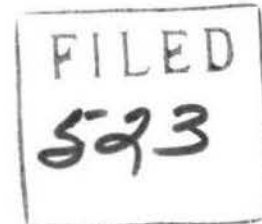
SUPREME COURT RULES:

A bondsman or surety is disqualified from making further bonds when a forfeiture has been entered upon a recogni-

zance to which he is a party, even though motions to set aside such forfeiture may be pending.

OPINION NO. 523

October 8, 1970



Mr. Thomas E. Allen
Assistant Prosecuting Attorney
Office of Prosecuting Attorney
Clay County Court House
Liberty, Missouri 64068

Dear Mr. Allen:

This is in response to your request for an official opinion of this office with respect to the following inquiry:

"Missouri Supreme Court Rule 32.14 designates the qualifications for individual surety on any bail bond, including subparagraph 5 of the Rule, which provides that the individual surety 'shall have no outstanding forfeiture or unsatisfied judgment thereon entered upon any bail bond in any court of this state or of the United States.'

"Missouri Supreme Court Rule 32.12 provides in pertinent part: 'If there is a breach of condition of a bond, the court in which a criminal case or proceeding is then pending shall declare a forfeiture of the bail. The court may direct that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture. When a forfeiture has not been set aside, the court shall on a motion enter a judgment of default and execution may issue thereon.'

"It is our opinion that, once a forfeiture is ordered by the appropriate court, the

Mr. Thomas E. Allen

individual surety is disqualified from issuing any further bonds until the forfeiture has either been set aside or paid into court. However, as a practical matter, almost every forfeiture results in a motion to set aside the forfeiture, which is taken under advisement by the court for a reasonable period of time to allow the bondsman to produce the defendant or otherwise remedy the breach of the bond's conditions.

"The specific question requested of our office and which we now ask you is whether a forfeiture becomes final for purposes of disqualifying the individual surety at the time the forfeiture is ordered or at the time the motion to set aside the forfeiture is ruled upon."

The qualifications of a surety are defined by Supreme Court Rule 32.1⁴, which provides, as follows:

"An individual shall not be accepted as a surety on any bail bond taken under these Rules unless he possesses the following qualifications:

1. He shall be a reputable person, at least twenty-one years of age and a bona fide resident of the State of Missouri.

2. He shall not have been convicted of any felony under the laws of any state or of the United States.

3. He shall not be an attorney-at-law, a peace officer, a constable or a deputy constable.

4. He shall not be an elected or appointed official or employee of the State of Missouri or any county or other political subdivision thereof.

5. He shall have no outstanding forfeiture or unsatisfied judgment thereon entered upon any bail bond in any court of this state or of the United States. (Emphasis added.)

Mr. Thomas E. Allen

The rule provides that a surety is not qualified if there is either an "outstanding forfeiture or unsatisfied judgment" entered on any bail bond to which he is a surety. The rules and statutory provisions contemplate both a forfeiture and a final judgment.

Supreme Court Rule 32.12 defines when a forfeiture shall occur and sets forth the procedure by which the forfeiture shall be reduced to judgment. That rule provides:

"If there is a breach of condition of a bond, the court in which a criminal case or proceeding is then pending shall declare a forfeiture of the bail. The court may direct that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture. When a forfeiture has not been set aside, the court shall on motion enter a judgment of default and execution may issue thereon. By entering into a bond the obligors submit to the jurisdiction of the court in which the defendant is required to appear under the condition thereof and in which a prosecution is or may be pending against the defendant and irrevocably appoint the clerk of the court as their agent upon whom any papers affecting their liability may be served. Their liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the obligors to their last known addresses."

The rule clearly contemplates both a forfeiture and a final judgment predicated upon the forfeiture. Similar distinctions are recognized in the statutory provisions concerning bond forfeitures.

Section 543.370, RSMo 1969, provides, as follows:

"If the defendant shall neglect to appear for trial or judgment, or upon any other occasion when his presence may be lawfully required, before a magistrate, according to the condition of his recognizance, the magistrate must enter

Mr. Thomas E. Allen

the default upon his record, and the recognizance shall thereupon be adjudged forfeited."

Section 543.380, RSMo 1969, provides, as follows:

"When judgment of forfeiture shall be entered upon any recognizance, as provided in section 543.370, the magistrate shall issue a citation to the defendant and his sureties in the recognizance, reciting therein that default has been made by defendant, and judgement (sic) of forfeiture rendered upon said recognizance, and that unless the defendant and his said sureties appear before such magistrate at a day and time designated in such citation, and show cause to the contrary, judgment will be entered against them for the full amount of said recognizance, with costs, and execution issued therefor. Such citation shall be served on the defendants therein, as a summons is served in civil cases, at least fifteen days before the return day thereof."

Section 543.390, RSMo 1969, provides, as follows:

"When such citation shall have been served upon the defendants therein, or any of them, as directed in section 543.380, the magistrate shall, unless good cause be shown against it, proceed in a summary manner to render judgment against the defendant and his sureties in said recognizance, or such as have been served, for the amount of the same, with costs; or, if any of said defendants have not been served, or not served in time, the magistrate may continue the case to a day certain, and issue another citation to the parties not served, or may dismiss as to those not served, and proceed to final judgment against those served, as herein directed."

Section 543.400, RSMo 1969, provides, as follows:

"Any defendant against whom a judgment may be rendered upon a forfeited recognizance, as herein provided in section

Mr. Thomas E. Allen

543.390, may appeal from such judgment, at any time within ten days after the rendition of the judgment, by filing an application stating that he verily believes himself injured and aggrieved by the judgment, and also entering into a recognizance with sufficient sureties, in the form and with the condition required in appeals from magistrates in civil cases; and the prosecuting attorney or prosecuting witness may appeal on behalf of the state, on filing an application therefor, without giving recognizances."

Section 544.640, RSMo 1969, provides, as follows:

"If, without sufficient cause or excuse, the defendant fails to appear for trial or judgment, or upon any other occasion when his presence in court may be lawfully required, according to the condition of his recognizance, the court must direct the fact to be entered upon its minutes, and thereupon the recognizance is forfeited, and the same shall be proceeded upon by scire facias to final judgment and execution thereon, although the defendant may be afterward arrested on the original charge, unless remitted by the court for cause shown."

As previously indicated, both the rules and statutory provisions contemplate a forfeiture and a final judgment as separate and distinct stages in bond forfeiture proceedings.

Forfeiture of bail is more in the nature of a decree of forfeiture than a judgment. An order of forfeiture has been held to be interlocutory in nature, the judgment absolute being entered in the proceedings on the forfeited bond or recognizance. The forfeiture itself becomes final, however, when it has been ordered and no timely application for relief is made. State v. Wynne, 181 S.W.2d 781 (Mo. 1944).

The language employed, "outstanding forfeiture," indicates that finality is not necessary. "Outstanding" is defined as "(c) Undischarged; uncollected or unpaid; unsettled; undetermined." Webster's New International Dictionary, Second Edition. Words are to be taken and considered in their plain or ordinary and usual sense. Section 1.040, RSMo 1969.

Mr. Thomas E. Allen

The distinction between forfeiture and final judgment is apparent in the decisions of the Supreme Court of Missouri.

In State v. Daigle, 442 S.W.2d 503, 505 (Mo. 1969), the court stated:

"In State v. Wynne, 356 Mo. 1095, 204 S.W.2d 927, this court, in construing what is now § 544.640, RSMo 1959, V.A.M.S., held that after default by a defendant and forfeiture of recognizance, a circuit court, in the proceeding there provided for to obtain final judgment and execution, may 'for cause shown' exercise its judicial discretion, even though the presence of the principal is not obtained. The proceeding for judgment after a declaration of forfeiture of bail is not governed by Supreme Court Rule 32.12, V.A.M.R., and it is there provided that 'The court may direct that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture.' We are of the opinion that the discretion of the court pursuant to this rule is at least as broad as that indicated in State v. Wynne."

In State v. Hammond, 426 S.W.2d 84, 86 (Mo. 1968), the court observed:

". . . If Criminal Rule 32.12 had been followed the court, after declaring the forfeiture, could have directed that the forfeiture be set aside if justice did not require enforcement of the forfeiture. If the forfeiture was not set aside the court, acting under the rule, could have entered judgment of default and issued execution, on motion. . . ."

Thus, we conclude that the procedure relating to forfeiture of bail bonds provide for two distinct stages of such proceeding; first, the forfeiture, and, second, the entry of final judgment upon a forfeited recognizance. A surety is disqualified if there is either an "outstanding forfeiture or unsatisfied judgment" entered on any bail bond to which he is a surety. An "outstanding forfeiture" occurs when there has been a breach of condition of a bond, however, the surety's

Mr. Thomas E. Allen

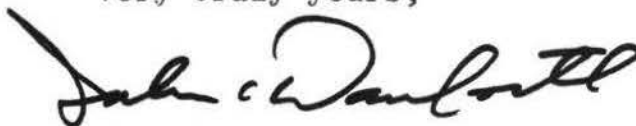
liability for that forfeiture remains unsettled or undetermined, either because of the surety's motion to set aside the forfeiture or because a final judgment upon a forfeited recognizance has not been entered.

CONCLUSION

Therefore, it is the opinion of this office that a bondsman or surety is disqualified from making further bonds when a forfeiture has been entered upon a recognizance to which he is a party, even though motions to set aside such forfeiture may be pending.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Gene E. Voigts.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a long horizontal stroke at the end.

JOHN C. DANFORTH
Attorney General

SCHOOLS:
STATE BOARD OF
EDUCATION:
COMMISSIONER OF
EDUCATION:

The plain and rational meaning of the word "administration" as used in Section 161.112, RSMo 1969, which sets forth the qualifications for the State Commissioner of Education, involves as an essential element the performance of executive duties. From the facts set forth in your telegram, the individual in question does not possess "breadth of experience in the administration of public education" as required by Section 161.112 and is, therefore, not qualified for appointment to the office of State Commissioner of Education.

OPINION NO. 524

October 7, 1970



Mr. F. Burton Sawyer
President
State Board of Education
919 West Adams
Kirkwood, Missouri

Dear Mr. Sawyer:

This is in response to your request for an opinion of this office with respect to the following inquiry:

"CONFIRMING TELEPHONE REQUEST PLEASE GIVE YOUR OPINION ON WHETHER STATE BOARD OF EDUCATION CAN APPOINT AS COMMISSIONER INDIVIDUAL WHO IS NOT A CERTIFIED TEACHER HE IS A MISSOURI STATE REPRESENTATIVE WITH SEVERAL YEARS EXPERIENCE AS MEMBER AND CHAIRMAN OF HOUSE EDUCATION COMMITTEE HE WAS A PART TIME PROFESSOR AT MISSOURI VALLEY COLLEGE FOR ONE YEAR AND MINISTER OF TWO CHURCHES HE HAS HIS MA DEGREE IN POLITICAL SCIENCE AND IS READY TO RECEIVE HIS PHD IN POLITICAL SCIENCE WITH SPECIAL FIELD EMPHASIS ON EDUCATION AND PUBLIC ADMINISTRATION"

Article IX, Section 2(b), Missouri Constitution, 1945, states as follows:

Mr. F. Burton Sawyer

"Commissioner of education--qualification, duties, and compensation--appointment and compensation of professional staff--powers and duties of State Board of Education.-- The board shall select and appoint a commissioner of education as its chief administrative officer, who shall be a citizen and resident of the state, and removable at its discretion. The board shall prescribe his duties and fix his compensation, and upon his recommendation shall appoint the professional staff and fix their compensation. The board shall succeed the State Board of Education heretofore established, with all its powers and duties, and shall have such other powers and duties as may be prescribed by law."

Section 161.112, RSMo 1969, implementing Article IX, Section 2(b), provides the qualifications for the Commissioner of Education:

"Commissioner of education--appointment--qualifications--compensation--removal.-- The state board of education shall appoint a commissioner of education as its chief administrative officer. The commissioner shall be a citizen who has resided in the state for at least one year immediately preceding his appointment and who possesses educational attainment and breadth of experience in the administration of public education. The board shall prescribe the duties of the commissioner and fix his compensation, and may remove him at its discretion." (Emphasis supplied.)

From the information furnished in your telegram, we believe that the initial question to be answered is whether this individual "possesses. . . breadth of experience in the administration of public education." The primary rule of statutory construction is to ascertain from the language used the intent of the legislature and to put upon the language used its plain and rational meaning in order to promote its object. Donnelly Garment Co. v. Keitel, 354 Mo. 1138, 193 S.W.2d 577, 581 (1946). Primary emphasis must be placed on the language used and all words must be considered in their ordinary and plain meaning. Section 1.090, RSMo 1969, Christy v. Petrus, 365 Mo. 1187, 295 S.W.2d 122, 126 (1945); Playboy Club v. Myers, 431 S.W.2d 228, 231 (Mo., 1968). When the language of a statute is explicit and unambiguous and its meaning clear and unmistakable:

Mr. F. Burton Sawyer

" . . . there is neither reason nor room for judicial construction. . . and, we find nothing in Section 443.430 (or in any related statute) which would indicate a legislative intent that the non-technical and commonplace language hereinbefore quoted from the cited statute should be construed otherwise than in its natural, plain and ordinary sense and meaning, or which would afford any legitimate basis for refusal to accept and apply that language honestly and faithfully. . . ." State ex rel. Hopkins v. Stemmons, 302 S.W.2d 51, 55 (Mo.App., 1957); State ex rel. Cobb v. Thompson, 319 Mo. 492, 5 S.W.2d 57, 59 (1928).

What is the "natural, plain and ordinary sense and meaning" of "breadth of experience in the administration of public education" as used by the legislature in Section 161.112? The crucial word in this phrase is "administration." Webster's Third New International Dictionary gives a number of meanings for "administration." However, in the context in which "administration" is used in Section 161.112, it is defined as "the performance of executive duties; MANAGEMENT, DIRECTION, SUPERINTENDENCE." The dictionary example of the use of "administration" in this context is the phrase "engaged in the administration of public affairs."

Ballentine's Law Dictionary (Third Ed., 1969) defines "administration" as follows:

"The execution of a law by putting it into effect, applying it to the affairs of men. The management, care, or control of anything; an executor's or administrator's management of the estate of a decedent; an officer's management of his office." (Emphasis supplied.)

Black's Law Dictionary (Fourth Ed., 1951) defines "administration" as:

"Managing or conduct of an office or employment; the performance of the executive duties of an institution, business, or the like." (Emphasis supplied.)

This definition is based on the case of Webb v. Frohmler, 52 Ariz. 128, 79 P.2d 510 (1938). In the Webb case the Arizona State Tax Commission attempted to use moneys appropriated for the administration of certain tax statutes for remodeling its offices. Plaintiff, a contractor, had presented for payment a bill for equipment and the state auditor had refused to approve it. The Court,

Mr. F. Burton Sawyer

in analyzing whether funds appropriated for the administration of statutes could be used by the Tax Commission to remodel its offices, commented as follows on the meaning of "administration":

"Anything which may be considered as reasonably necessary and proper for the commission to do in the administration of the acts may be paid for out of the appropriation, but anything, no matter how desirable in itself, which is not reasonably to be classed as a cost of administration is not permissible. The word 'administration' means 'managing or conduct of an office or employment; the performance of the executive duties of an institution, business or the like.'" Id. at 514 (Emphasis supplied.)

In another case involving the definition of the word "administration", People ex rel. Elkind v. Rosenbloom, 184 Misc. 916, 54 NYS 2d 295 (1945), the question was whether a state or local law governed the appointment of members of the Board of Education of a certain class of cities in New York. In analyzing a constitutional provision crucial to this question, the Court stated:

". . . moreover, the Constitution expressly excluded from the power granted to cities to adopt local laws, whether adopted by local legislation, or by popular vote, any enactment which might apply to or affect the administration of the public school systems in such cities. Administration is generally understood to mean management, direction or supervision. . . ." Id. at 300. (Emphasis supplied.)

From the foregoing, we conclude that the plain and rational meaning of "administration" involves as an essential element the performance of executive duties. That the legislature, by using the word "administration" in Section 161.112, intended that the Commissioner of Education shall have had actual experience in the management, direction or superintendence of public education is emphasized by the nature of the duties imposed on the Commissioner of Education. The State Board of Education has the overall responsibility for the supervision of the public schools of Missouri. Article IX, Section 2(a), Missouri Constitution, 1945, and Section 161.092, RSMo 1969. The Commissioner of Education, as the Board's chief administrative officer, must supervise and direct the professional staff and other employees of the Board in the day-to-day implementation of the Board's policies. Furthermore, the Commissioner has certain specified duties imposed upon him by Section 161.122, RSMo 1969:

Mr. F. Burton Sawyer

"Duties of the commissioner.--The commissioner of education shall supervise the division of public schools. Either in person or by deputy, he shall confer with and advise county and school district officers, teachers, and patrons of the public schools on all matters pertaining to the school law; visit and supervise schools, and make suggestions in regard to the subject matter and methods of instruction, the control and government of the schools, and the care and keeping of all school property; attend and assist in meetings of teachers, directors, and patrons of the public schools; and seek in every way to elevate the standards and efficiency of the instruction given in the public schools of the state."

Executive experience in the field of public education, "experience in the administration of public education," would be invaluable, if not essential, in the performance of these duties.

Has the individual described in your telegram had any experience in the administration of public education? We note that he "is a Missouri State Representative with several years' experience as a member and chairman of House Education Committee." Although this legislative experience may have exposed him to certain administrative problems associated with public education, we do not believe this would constitute experience in the actual management, direction or superintendence of public education. The performance of executive duties in public education would not be the responsibility of a state legislator.

Examining the other facts set forth in your telegram, we find nothing which would constitute "experience in the administration of public education." Therefore, we conclude that the individual described in your telegram would not fulfill the qualifications for Commissioner of Education as contained in Section 161.112, RSMo 1969.

CONCLUSION

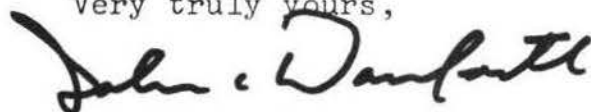
Therefore, it is the opinion of this office that the plain and rational meaning of the word "administration" as used in Section 161.112, RSMo 1969, which sets forth the qualifications for the State Commissioner of Education, involves as an essential element the performance of executive duties. From the facts set forth in your telegram, the individual in question does not possess "breadth of experience in the administration of public education" as

Mr. F. Burton Sawyer

required by Section 161.112 and is, therefore, not qualified for appointment to the office of State Commissioner of Education.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, D. Brook Bartlett.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

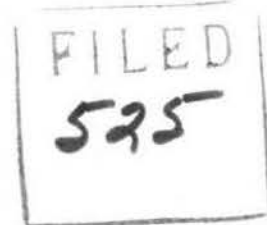
JOHN C. DANFORTH
Attorney General

October 14, 1970

OPINION LETTER NO. 525

(Answered by letter-Park)

Honorable James E. Schaffner
Director of Revenue
Department of Revenue
State of Missouri
Jefferson Building
Jefferson City, Missouri 65101



Dear Mr. Schaffner:

This is in response to your request for an opinion on the following matter as set forth in your letter:

"In the light of Section 144.440 and 144.450, RSMo. 1969, establishing a highway use tax and exemptions therefrom, must the donee of an automobile, or one who receives an automobile through a will or through non-testamentary inheritance, pay a highway use tax to the State of Missouri, where the donor, testator, or intestate has previously paid a sales tax in another state and fully registered the automobile in that state, and the donee or heir seeks to register the automobile in Missouri?"

On July 21, 1953, this office issued Attorney General Opinion No. 12 to Honorable David A. Bryan, Supervisor, Motor Vehicle Registration, Department of Revenue, in which it was concluded that where a motor vehicle is registered and operated in another state in good faith by the owner for ninety days or more following which it is moved into Missouri, the owner is exempt from sales or use tax under Section 144.450. If, however, the owner gives an interest in the vehicle to another person, the Missouri Sales or Use Tax must be paid

Honorable James E. Schaffner

upon registration in Missouri.

We believe that the conclusions reached in that opinion represent a correct statement of the law as it exists at the present time, therefore Opinion No. 12 expresses the view of this office with respect to the facts stated therein. A copy of the opinion is enclosed herewith for your information and guidance.

We believe the conclusion reached in the foregoing opinion is applicable to the facts presented in your letter and as a consequence thereof it is the opinion of this office that a Missouri Use Tax is payable by the donee or heir who seeks to register the automobile in Missouri.

If anything further is needed in this regard, please advise us.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosure:

OP.No.12-Bryan-1953

Answer by Letter (Klaffenbach)

October 8, 1970

OPINION LETTER NO. 528

Honorable Bob F. Griffin
Prosecuting Attorney
Clinton County Court House
223 East Third Street
Cameron, Missouri



Dear Mr. Griffin:

This letter is in response to your opinion request in which you ask concerning the constitutionality of the requirement of Section 493.050, RSMo 1969, that a "legal newspaper" for publication purposes "shall have been published regularly and consecutively for a period of three years".

While we find no Missouri cases directly considering this constitutional question, we do note that in *State v. Proctor*, 361 S.W.2d 802, the Supreme Court of Missouri en banc, in 1962, impliedly approved this requirement by the following statement from l.c. 805:

"Prior to 1937 the law of Missouri (Laws 1931, p. 303) provided that such newspapers be published regularly and consecutively for a period of only one year. In 1937 the period was changed to require a period of three years. We think it may be reasonably deduced that the primary and basic purpose of the act is to require publication in a "going", regularly published and well established newspaper. This, upon the theory that, by reason of long establishment of the newspaper in which it is published, the notice will be more likely to come to the attention of a greater number of citizens of the county."

Honorable Bob F. Griffin

We have examined this section and considered the requirement in question and find no clear violation of any constitutional provision.

It is a well settled principle of constitutional construction that, only when there is a clear conflict between a legislative enactment and the constitution, are the courts warranted in declaring the law to be void. In the Matter of Burris, 66 Mo. 442, 450 (1877), Borden Co. v. Thomason, 353 S.W.2d 735, 756 (Mo. 1962).

Very truly yours,

JOHN C. DANFORTH
Attorney General

ASSESSORS:

COOPERATIVE AGREEMENTS:

1. The county assessor of Marion County, Missouri, may enter into a cooperative agreement with the City of Hannibal under such terms and conditions as may be approved by the county court, as provided under the provisions of Sections 70.210 to 70.230, RSMo to perform the duties of the City Assessor of Hannibal. 2. The County Assessor of Marion County has no authority to perform the duties of the City Assessor of Hannibal except as provided under Sections 70.210 to 70.230, RSMo. 3. Under such agreement the county assessor may use the facilities of his office and services of his deputies and clerks in performing the duties of the city assessor. 4. All compensation paid by the City of Hannibal for the use of such facility, and the services of the assessor, his deputies and clerks shall be paid to Marion County and deposited in the county treasury.

OPINION NO. 530

December 10, 1970

Honorable Ronald R. McKenzie
Prosecuting Attorney
Marion County Court House
B & L Building, 3rd &
Broadway
Hannibal, Missouri 63401



Dear Mr. McKenzie:

This is in response to your request for an opinion from this office as follows:

"Briefly, it has been the custom and practice of the City of Hannibal, located within Marion County, Mo., to pay our Asessor [sic] the sum of \$4,000.00 a year from City Funds for assessing property within the City Limits of Hannibal, and for the City of Hannibal. The Assessor is contending that in spite of Senate Bill #1 which became effective on September 1, 1970, that he should still get \$4,000.00 from the City of Hannibal and there is some question

Honorable Ronald R. McKenzie

insofar as the County Clerk is concerned as to whether or not this \$4,000.00 payment should not be made direct to the County Treasurer.

"You will recall that effective September 1, 1970, pursuant to Senate Bill #1, the Assessor would be pay [sic] on a monthly basis out of the General Revenue. The amount to be paid is based on the valuation of the County the preceding year. The bill further provides that the County must pay for all help requested by the Assessor and approved by the County Court. Our questions are as follows:

"1. Under Senate Bill #1, is the Assessor entitled to receive remuneration from another political subdivision, (the City of Hannibal, Missouri), if the County pays all the salaries of the Assessor and Deputy Assessors.

"2. If the County Assessor is also appointed the City of Hannibal Assessor, is the remuneration paid by said City of Hannibal to be given to and retained by the County Assessor or should that money be paid into the County Treasury of the County and of course belong to the County."

The City of Hannibal, Marion County, Missouri is a constitutional charter city formed under the provisions of the Constitution of Missouri. Marion County is a third class county with an assessed valuation of \$54,565,501.00 according to the 1967-70 Official Manual of the State of Missouri.

The question you submit concerns a public officer contracting with a public entity for the performance of a public service. The principles of law are entirely different from those that would be involved when contracting with an individual regarding private employment or service.

Counties, cities and public officials derive their authority from the state and have only such authority as expressly given them by law and that which is necessarily implied in order to execute that which is expressly given. Lancaster v. Atchinson County, 180 S.W.2d 706, 352 Mo. 1039.

Honorable Ronald R. McKenzie

Section 8.03 of the Charter of the City of Hannibal provides:

"The Division of Assessment shall consist of the City Assessor. The Assessor shall be appointed by the Mayor with the advice and consent of the Council, shall receive such compensation as may be provided by ordinance and shall hold office for a term of four years and until his successor is appointed and qualified. The Mayor may appoint as City Assessor the duly elected and acting Assessor of Marion County. The Assessor shall perform the duty of assessing and valuing, as a basis for the imposition of ad valorem or direct property taxes, real and tangible personal property subject to such taxation in this city, including but not limited to the stocks of goods, raw materials, finished products, goods in process, tools, machinery, and equipment of merchants and manufacturers which may be subject to ad valorem merchants' or manufacturers' taxes. He may perform such other duties with reference to assessment of taxes of any kind which may be properly levied by the city as may from time to time be conferred upon him by ordinance. All assessments made by the Assessor shall be subject to review and revision by the Council sitting as a Court of Appeal in the manner provided by ordinance."

Under the above charter provisions of the City of Hannibal, the mayor of Hannibal has authority to appoint as the city assessor the county assessor of Marion County to perform the duties of city assessor. If he is appointed under this charter provision it has to be in his official capacity as county assessor.

Section 70.210, RSMo provides that the terms used in Section 70.210 to 70.320, RSMo have the following meaning:

"(1) 'Governing body', the board, body or persons in which the powers of a municipality or political subdivision are vested;

"(2) 'Political subdivision', counties,

Honorable Ronald R. McKenzie

townships, cities, towns, villages, school, county library, city library, city-county library, road, drainage, sewer, levee and fire districts, soil and water conservation districts, watershed subdistricts, and any board of control of an art museum."

Section 70.220, RSMo provides:

"Any municipality or political subdivision of this state, as herein defined, may contract and cooperate with any other municipality or political subdivision, or with an elective or appointive official thereof, or with a duly authorized agency of the United States, or of this state, or with other states or their municipalities or political subdivisions, or with any private person, firm, association or corporation, for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service; provided, that the subject and purposes of any such contract or cooperative action made and entered into by such municipality or political subdivision shall be within the scope of the powers of such municipality or political subdivision. If such contract or cooperative action shall be entered into between a municipality or political subdivision and an elective or appointive official of another municipality or political subdivision, said contract or cooperative action must be approved by the governing body of the unit of government in which such elective or appointive official resides."

Under the above statutory provision, the county of Marion and the City of Hannibal may contract with each other or with an elective or appointive official thereof for a common service. It is our view that since the county and city are each required to assess property for tax purposes it is a common service under the statutes.

Section 70.290 provides in part that all officers acting under the authority of a municipality or political subdivision pursuant to such agreement or cooperative action under these statutes shall be deemed to be acting for a governmental purpose.

Honorable Ronald R. McKenzie

Section 70.310, RSMo provides that:

"All money received pursuant to any contract or cooperative action, under the provisions of sections 70.210 to 70.320, unless otherwise provided by law, shall be deposited in such fund or funds and disbursed in accordance with the provisions of such contract or cooperative action."

Section 53.010, RSMo provides that each county in this state, except those under township organization, shall elect a county assessor, who shall enter upon the discharge of his duties on the first day of September next after his election, and shall hold office for a term of four years.

Under Senate Bill #1, enacted by the Seventy-fifth General Assembly, Third Extraordinary Session, the county assessor, clerks and deputies shall receive an annual salary payable monthly for the performance of their duties, the salary of the assessor to be determined upon the assessed valuation in each county.

The duties of the county assessor are found in Chapter 137, RSMo. It is the statutory duty of the county assessor of Marion County to assess all property for taxation for the county and state. It is the duty of the assessor of the City of Hannibal to assess property for taxation for the city as provided for in the charter provisions. Since the county and city are each required to have the property assessed for taxation, it is a common service in the scope of the powers of the county and city which each may contract and cooperate with in its performance.

We are enclosing herewith Opinion No. 23 issued by this office on January 21, 1970 to Honorable P. Wayne Kuhlman, Assistant Prosecuting Attorney, Clay County, Missouri that Clay County could contract with municipalities of Clay County to extend the taxes for said municipalities. Such opinion holds that the county clerk has the discretion and authority to decide whether he will enter into a cooperative agreement with the municipality and if such a contract is entered into, it must be approved by the county court before it is effective and that any consideration made pursuant to such contract must be paid into the county treasury.

We believe the same principles of law discussed in the above opinion apply to the facts under consideration.

It is our view that the county assessor as such has only

Honorable Ronald R. McKenzie

such authority to contract with the municipality, for the performance of a public service such as this, as is provided by statute and that which is given by law to municipalities. The authority to contract in such matters is governed by the provisions of Section 70.210 to 70.320, RSMo. Any contract he enters into with any city for the performance of a public service such as assessing property has to be done in his official capacity as county assessor, and under such terms and conditions as may be approved by the county court including the use of the facilities of the county and the services of the deputies and clerks. However, all compensation received for this service shall be deposited in the county treasury.


CONCLUSION

It is the opinion of this office that:

1. The county assessor of Marion County, Missouri, may enter into a cooperative agreement with the City of Hannibal under such terms and conditions as may be approved by the county court, as provided under the provisions of Sections 70.210 to 70.230, RSMo to perform the duties of the City Assessor of Hannibal.
2. The County Assessor of Marion County has no authority to perform the duties of the City Assessor of Hannibal except as provided under Sections 70.210 to 70.230, RSMo.
3. Under such agreement the county assessor may use the facilities of his office and services of his deputies and clerks in performing the duties of the city assessor.
4. All compensation paid by the City of Hannibal for the use of such facility, and the services of the assessor, his deputies and clerks shall be paid to Marion County and deposited in the county treasury.

The foregoing opinion, which I hereby approved, was prepared by my Assistant, Moody Mansur.

Very truly yours,


JOHN C. DANFORTH
Attorney General

TAXATION (INCOME): (1) The Missouri Income Tax law cannot
TAXATION (SALES AND USE): be amended after January 1, 1971, in-
creasing tax rates or otherwise alter-
ing tax liability, making the change effective for the entire year
1971. (2) Missouri may impose a surtax on income similar to the
surtax imposed by the federal government. (3) The General Assembly
cannot impose an income tax computed solely on the basis of tax-
payer's federal income tax liability. (4) The Missouri General As-
sembly cannot legally use the entire 1971 income as the basis for a
surtax or as the basis for imposing a tax computed on a percentage
of the federal tax where the law is passed after January 1, 1971.
(5) Section 13 of Article I of the Missouri Constitution prohibits
enactment of retrospective tax laws irrespective of whether the tax
is imposed upon individuals or corporations. (6) The legislature
can provide for referral of tax increase measures earmarking a part
of the increase for support of public education to the electorate
by referendum. (7) It is legal to impose a tax on sales of adver-
tising.

December 15, 1970

OPINION NO. 532

Honorable Richard Southern
Member, Missouri Senate
511 West Chestnut
Monroe City, Missouri 63456



Dear Senator Southern:

This official opinion is issued in response to the request con-
tained in your letter concerning the legality of certain proposed
changes in the State Income and Sales Tax laws.

As we understand your letter, the questions raised may be sum-
marized as follows:

1. Can the Missouri Income Tax law be amended after January 1,
1971, increasing tax rates or otherwise altering tax liability,
making this change effective for the entire year 1971?
2. Can Missouri impose a surtax on income similar to the sur-
tax imposed by the federal government?
3. Can Missouri impose an income tax computed solely on the
basis of taxpayer's federal income tax liability?

Honorable Richard Southern

4. Can the Missouri Legislature legally use the entire 1971 income as the basis for a surtax or as the basis for imposing a tax computed on a percentage of the federal tax where the law is passed after January 1, 1971?

5. Would the answers to the questions be the same as to individual and corporate income taxes?

6. Can the legislature specifically provide for referral of tax increase legislation to the electorate?

7. Is it legal to impose a sales and use tax on advertising?

The questions will be considered in the order in which they have been presented.

1. Section 13, Article I, of the Missouri Constitution provides:

"That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted."

This constitutional provision was considered by the Supreme Court of Missouri in the case of Smith vs. Dirckx, 283 Mo.188, 223 S.W.104, where it was held that an amendment to the income tax law increasing the rates for the entire year during which the amendment was passed was invalid but the former rates might be applied up to the effective date of the amendment.

In State ex rel. Koeln v. Southwestern Bell Telephone Company, 316 Mo.1008, 292 S.W.1037, it was decided that a rate decrease could not be made retroactive but could be applied only from the effective date of the statute. Similarly, in Graham Paper Co. vs. Gehner, et al, 332 Mo.155, 59 S.W.2d 49, the court found that a change in basis from intrastate business to a portion of all business, including interstate business, could not be made retroactive.

In 1968, Article X of the Constitution of Missouri was amended by adopting Section 4(d), which reads as follows:

"In enacting any law imposing a tax on or measured by income, the general assembly may define income by reference to provisions of the laws of the United States as they may be or become effective at any time or from time to time, whether retrospective or prospective in their operation. The general assembly shall in any such law set the rate or rates of such tax. The general assembly may in so defining income make exceptions, additions, or modifications to any provisions of the

laws of the United States so referred to and for retrospective exceptions or modifications to those provisions which are retrospective."

This constitutional provision has not been construed by the courts; however, it is our opinion that it does not conflict with Section 13, Article I, supra, insofar as tax rates are concerned and does not authorize the General Assembly to enact retrospective tax rates. It does authorize definition of Missouri taxable income by reference to laws of the United States which are retrospective in their operation. It is our view, therefore, that the legislature cannot enact an income tax law after January 1, 1971, making its new rates effective for the entire year 1971. The old rates would apply to the effective date of the new law after which the new rates would be applicable.

2. A surtax is nothing more than an extra tax or charge or an additional tax. For federal tax purposes the surtax in times past was a graduated income tax in addition to the normal income tax imposed on the amount by which one's net income exceeds a specified sum. At the present time, the federal surtax is merely an additional tax computed on the basis of a certain percentage of the taxpayer's normal income tax. All of the rules or principles applicable to imposition of ordinary income taxes in Missouri would be equally applicable to the imposition of a surtax on income in Missouri. There appears to be no legal objection to the imposition of a surtax as such.

3. A system of imposing state income taxes on the basis of a percentage of federal income tax liability has been adopted by several states and has gained judicial approval in at least two of these. Prior to its admission as a state the Territory of Alaska adopted such a law. The legislative design was to base the income tax on the federal income tax law as then in existence or thereafter amended and to calculate the tax as a percentage of the federal tax. Under the Alaska Organic Act it had the privilege of legislating, including the levying and collecting of taxes and revenue, in much the same manner as a state. The law was considered and upheld by the United States Court of Appeals for the Ninth Circuit in *Alaska Steamship Company v. Mullaney*, 180 F.2d 805. After Alaska became a state, its Supreme Court in *Hickel v. Stevenson*, 416 P.2d 236 approved the basic foundation of the Alaska Act which was to make the state's claim for income taxes contingent upon the establishment of liability for federal income taxes.

Likewise, the Nebraska Revenue Act of 1967 imposed a Nebraska tax on income which is based upon a percentage of the federal income tax liability. This law was adopted pursuant to authority granted by Article VIII, Section 1B, of the Constitution of Nebraska which provides: "When an income tax is adopted by the Legislature, the Legislature may adopt an income tax law based upon the laws of the United States." The income tax statute was upheld by the Supreme Court of that state in *Anderson v. Tiemann*, 182 Neb.393, 155 N.W.2d 322.

Honorable Richard Southern

The State of Vermont has a tax on income which is measured by a percentage of the federal income tax. We have found no specific provision in the Constitution of Vermont authorizing the imposition of tax in this manner nor have we found any decision of the courts approving or disapproving this statute.

Aside from any constitutional provision, the technique of one statute incorporating by reference another is a valid exercise of the legislature. This is true even though the incorporated statute was passed by a different legislative body. General Installation Co. v. University City, Mo.Banc., 379 S.W.2d 601; State ex rel. School Dist. of Kansas City v. Lee, Mo.Banc., 66 S.W.2d 521; State ex rel. Feinstein v. Hartmann, Mo.Banc., 231 S.W.982.

In Missouri, Section 4(d) of Article X of the Constitution, supra, contains an express provision relating to incorporation of the laws of the United States by reference in connection with imposition of an income tax in Missouri. Inasmuch as the framers of the constitution have undertaken to provide the manner in which federal laws can be used in connection with state income tax statutes, the legislature must limit itself accordingly. The constitution states that the General Assembly may refer to laws of the United States in connection with defining Missouri income and that independent of the federal statutes the General Assembly will establish the rate of tax. It is observed that this constitutional provision is more restrictive than the provision found in the Nebraska constitution which authorizes the adoption of an income tax law based upon the laws of the United States. The Missouri constitutional provision limits the use of federal laws to the area of defining income for tax purposes. This envisions that after the income is thus defined, the tax rate as established by the General Assembly will be applied to that income figure rather than to the amount of federal tax.

It is our opinion that the Constitution of Missouri prohibits the use of the federal income tax as a basis for computing the Missouri income tax.

4. The principles of law set forth in answer to the first question presented by your letter are equally applicable to prohibit retrospective legislation of the type presented in the fourth question.

5. It is our opinion that Section 13 of Article I of the Missouri Constitution prohibits enactment of retrospective tax rates irrespective of whether the tax is imposed upon individuals or corporations.

6. A referendum of tax increase legislation can be ordered by the legislature pursuant to authority contained in Section 52(a) of Article III of the Constitution where it is stated:

"A referendum may be ordered (except as to laws necessary for the immediate preservation of the public peace, health or safety, and laws making appropriations for the current expenses of the state government, for the maintenance of state institutions and for

the support of public schools) either by petitions signed by five percent of the legal voters in each of two-thirds of the congressional districts in the state, or by the general assembly, as other bills are enacted. * * * "

As we understand the question the proposed tax increase legislation would earmark a part or percentage of the tax increase for support of public education. Such a law would not be an appropriation measure in the sense used in Section 52(a) of Article III where it is provided that the referendum process is not available with respect to laws making appropriations for the support of public schools. Under the circumstances presented it is our view that the legislature could provide for referral of the legislation to the electorate.

7. Your letter suggests that a Missouri law imposing sales and use taxes on advertising might be illegal and unconstitutional. The reasons expressed were that this would be taxing a service rather than sales of tangible personal property and would be arbitrary and discriminatory in that it taxes one type of service while excluding others. We do not agree that such a tax would be illegal. Chapter 144, RSMo 1969, at present imposes a tax on sales of services by telephone and telegraph companies as well as certain other services.

The Fourteenth Amendment to the Constitution of the United States provides that no state may deny any person within its jurisdiction the right of due process of law or equal protection of the law. This amendment prevents discriminatory taxation or unreasonable classification of taxpayers.

Article X, Section 1 of the Missouri Constitution provides:

"The taxing power may be exercised by the general assembly for state purposes, * * * "

Article X, Section 3, provides:

"Taxes may be levied and collected for public purposes only, and shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax. * * * "

The uniform taxation provisions of the state constitution and the equal protection clause of the Fourteenth Amendment contain no absolute requirement of uniformity in taxation but only require that taxation of subjects within the same class or category to be uniform. State ex rel. Jones vs. Nolte, Mo.S.Ct., 165 S.W.2d 632. In Ex parte Asotsky, 5 S.W.2d 22, 319 Mo.810, it was held that classification for taxing purposes is largely a legislative question and particular classifications will be upheld if justifiable upon any reasonable theory.

In 508 Chestnut, Inc., v. City of St. Louis, 389 S.W.2d 823, appeal dismissed 382 U.S.203, an ordinance levying a two per cent

Honorable Richard Southern

tax on gross daily rental receipts of hotels from transient guests was held not to violate the uniformity requirements of the state constitution. The court said in effect that there is no absolute requirement of uniformity in taxation and the only constitutional requirement is that taxation of subjects which fall in the same class or category shall be uniform. Uniformity does not require that all subjects of taxation be taxed and does not mean universality. It is our opinion that an otherwise legally adopted sales tax law would not be rendered invalid by reason of imposing this tax on all members of the class of persons selling advertising.

CONCLUSION

It is the opinion of this office that:

(1) The Missouri Income Tax law cannot be amended after January 1, 1971, increasing tax rates or otherwise altering tax liability, making the change effective for the entire year 1971

(2) Missouri may impose a surtax on income similar to the surtax imposed by the federal government.

(3) The General Assembly cannot impose an income tax computed solely on the basis of taxpayer's federal income tax liability.

(4) The Missouri General Assembly cannot legally use the entire 1971 income as the basis for a surtax or as the basis for imposing a tax computed on a percentage of the federal tax where the law is passed after January 1, 1971.

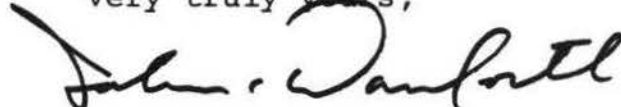
(5) Section 13 of Article I of the Missouri Constitution prohibits enactment of retrospective tax laws irrespective of whether the tax is imposed upon individuals or corporations.

(6) The legislature can provide for referral of tax increase measures earmarking a part of the increase for support of public education to the electorate by referendum.

(7) It is legal to impose a tax on sales of advertising.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John E. Park.

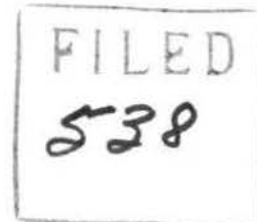
Very truly yours,



JOHN C. DANFORTH
Attorney General

October 29, 1970

OPINION LETTER NO. 538
Answer by letter - Jones



Mr. G. L. Donahoe
Executive Secretary
The Public School Retirement
System of Missouri
P. O. Box 268
Jefferson City, Missouri 65101

Dear Mr. Donahoe:

This letter is to acknowledge receipt of your request for an opinion in regard to whether or not the employees of the Board of Trustees of the Public School Retirement System are covered under the provisions of Senate Bill 213 relating to workmen's compensation. If such employees are not covered under Senate Bill 213, you also request what procedure would be necessary to secure coverage.

Senate Bill 213 as passed by the Seventh-fifth General Assembly and which became effective on October 13, 1969, provided that the provisions of Chapter 287, RSMo, governing workmen's compensation was extended to include state employees. The term "state employee" is defined in Section 105.800, RSMo 1969, to mean:

" . . . any person who is an elected or appointed official of the state of Missouri or who is employed by the state and earns a salary or wage in a position normally requiring the actual performance by him of duties on behalf of the state."

In addition, Section 105.810, RSMo 1969, provides that the

Mr. G. L. Donahoe

State of Missouri shall have the option to become a self-insurer and assume all liability imposed by Chapter 287, RSMo, or to purchase insurance in companies licensed to write workmen's compensation insurance in this state.

In accordance with Sections 169.010 through 169.130, RSMo 1969, the Board of Trustees is responsible for the administration and operation of a retirement system for teachers of all school districts located in the State of Missouri with exception of the cities of St. Louis and Kansas City. Sections 169.600 through 169.710, RSMo 1969, also provides that the Board of Trustees shall be responsible for the operation and administration of a retirement system for non-teacher employees of all school districts located in the State of Missouri, with the exception of the cities of St. Louis and Kansas City. Section 169.030, RSMo 1969, provides that funds required for the operation of the teacher retirement system shall come from contributions made in equal amounts by members of the system and their employers. Likewise, Section 169.620, RSMo 1969, provides that funds required for the operation of the non-teacher school employees' retirement system shall come from contributions made in equal amounts by employees of the school districts and their employers. Sections 169.040 and 169.630, RSMo 1969, provide that these funds belong to each retirement system and do not become funds of the State of Missouri and may not be comingled with state funds. Subsection 10 of Section 169.020, RSMo 1969, provides that the Board of Trustees shall employ a full time secretary, not one of their number, who shall be the executive officer of the Board. Other employees of the Board shall be chosen only upon the recommendation of the secretary. The law does not specifically provide that payment of employees of the Board of Trustees shall be made from any particular funds of the system. However, it is our understanding that in actual practice, the operating expenses of the system, including salary payments to employees of the system, are made from interest earned on invested funds of the system.

In Attorney General Opinion No. 3, Atterbury, 10-7-57, it was held that the director and employees of the Public School Retirement System did not qualify to become members of the Missouri State Employees' Retirement System (copy attached). The reasoning of the opinion was that with the establishment of the Teacher Retirement System, it received no appropriations from the state, but was an entirely self-sufficient unit operating on its own funds, which were by statute declared not to be state funds. Payment of administrative expenses and the compensation of the director and his employees were made from the fund, not from appropriations, and therefore the System could

Mr. G. L. Donahoe

not qualify under the definition of "department" in the provisions of the Missouri State Employees' Retirement Act.

As indicated previously, Section 1 of Senate Bill 213 defines a state employee as one employed by the state and who earns a salary or wage in a position normally requiring the actual performance by him of duties on behalf of the state. Section 2 of Senate Bill 213, provides that the State of Missouri shall have the option to become a self-insurer and assume all liability under the Workmen's Compensation Act, or to purchase insurance in companies licensed to write workmen's compensation insurance. It is our view that it was the intent of the legislature to pay out of state appropriated funds the workmen's compensation claims or workmen's compensation insurance premiums only for employees who are paid by the state. In view of the attached opinion and statutory provisions relating to the Public School Retirement System, it is our view that the employees of the Board of Trustees of the Public School Retirement System are not covered under Senate Bill 213.

Having decided that the employees of the Board of Trustees of the Retirement System are not covered under Senate Bill 213, we now consider what procedure would be necessary to secure coverage under the Workmen's Compensation Act.

The Workmen's Compensation Law, Section 287.090, RSMo 1969, provides:

"1. Sections 287.050 to 287.080 and 287.120 shall not apply to any of the following employments:

"(1) Employments by the state, county, municipal corporation, township, school or road, drainage, swamp and levee districts, or school board, board of education, regents, curators, managers, or control commission, board or any other political subdivisions, corporation, or quasi corporation thereof;

* * *

"2. Any employer in this section exempted from the operation of sections 287.050 to 287.080 and 287.120 may bring himself within the provisions of this chapter by filing with the division notice of his election to accept the provisions, or by the purchasing and accepting

Mr. G. L. Donahoe

by the employer of a valid compensation insurance policy, and the election by the purchase and acceptance of the insurance policy shall include the exempted employments described in subdivisions (1), (2), (3), and (4) of subsection 1 if such intent is shown by the terms of the policy. The election shall take effect and continue from the date of filing with the division by the employer of his election to accept liability under this chapter, or from the effective date of the insurance policy. Any employer electing to become liable under this chapter may withdraw his election by filing with the division a notice that he desires to withdraw his election, which withdrawal shall take effect thirty days after the date of the filing, or at such later date as may be specified in the notice of withdrawal."

Section 287.030, RSMo 1969, defines the word "employer" as follows:

"1. The word 'employer' as used in this chapter shall be construed to mean:

* * *

"(2) The state, county, municipal corporation, township, school or road, drainage, swamp and levee districts, or school boards, board of education, regents, curators, managers or control commission, board or any other political subdivision, corporation, or quasi corporation, or cities under special charter, or under the commission form of government, which elects to accept this chapter by law or ordinance."

As a result of the foregoing statutory provisions, it would appear that the employees could be subject to Chapter 287 if the Board of Trustees files an election with the State Division of Workmen's Compensation to accept the provisions of Subsection 2 of Section 287.090, RSMo 1969. In this regard an action was brought in the case of Hickey v. Board of Education of the City of St. Louis, 256 S.W.2d 775, (Mo. En Banc 1953) to enjoin the expenditure of funds to procure insurance covering the liability of a city board of education under the Workmen's Compensation Act.

Mr. G. L. Donahoe

However, the Supreme Court held that the proposed expenditure was authorized by the constitution and Sections 287.030 and 287.090, RSMo 1969.

We therefore conclude that the Board of Trustees of the Public School Retirement System has the authority to elect to accept the provisions of Chapter 287, relating to the Missouri Workmen's Compensation Law, for the benefit of its employees.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosure:

Op. No. 3
10-7-57, Atterbury

November 18, 1970

OPINION LETTER NO. 541

Answered by Letter - Klaffenbach

Honorable Robert S. Drake, Jr.
Prosecuting Attorney
Benton County Court House
Warsaw, Missouri 65355



Dear Mr. Drake:

This letter is in answer to your opinion request in which you ask the following:

"We have in this county a nursing home established under Chapter 198 R.S.Mo, which is not operating a nursing home and in which the voters of the district have on three separate occasions refused to approve a bond issue for the construction of a nursing home. Under section 198.360 R.S.Mo. as amended 1969 the board of that district must submit to the voters a proposition on the dissolution of that district but the statute fails to give the required notice for the election and form of the ballot and the question is whether or not the procedure provided in R.S.Mo. sections 198.250 through 198.270 would apply, with changes in the ballot and if not what procedure should be followed?"

Section 198.360, RSMo, 1969 states:

Honorable Robert S. Drake, Jr.

"In any nursing home district created under the provisions of chapter 198, RSMo 1967 Supp. which is not operating a nursing home, and in which the voters of said district have on three separate occasions refused to approve a bond issue for the construction of a nursing home, the board of said district shall submit to the voters the proposition of the dissolution of the district. If a majority of the voters approve the dissolution, said district shall be dissolved and any tax money in the treasury shall be rebated to the original taxpayer on a pro rata basis."

Section 198.250, RSMo 1969, applicable to an election to determine whether a district shall be organized states:

"Notice of the election shall be given by publication on three separate days in one or more newspapers having general circulation within the territory, the first of which publications shall be not less than thirty days prior to the date of the election, and by posting notices in ten of the most public places in the territory, and in case no newspaper has a general circulation in the territory, the notices shall be so posted if fifteen of the most public places therein, not less than thirty days prior to the date of the election. Each notice shall state briefly the purpose of the election, setting forth the proposition to be voted upon, form of ballot to be used at the election, a description of the territory, set forth the election precincts, and designate the polling places therefor. The notice shall further state that any district upon its establishment shall have the powers, objects and purposes provided by sections 198.200 to 198.350, and shall have the power to levy a property tax not to exceed fifteen cents on the one hundred dollars valuation."

Section 198.260, RSMo 1969, provides the form of the ballot at such election.

Honorable Robert S. Drake, Jr.

Although, as you indicated in your letter the legislature did not provide the form of the notice for dissolution or the form of the ballot for dissolution or the procedures to be followed, it is our view that insofar as applicable the procedures outlined in Section 198.250 should be followed for dissolution of the district. While we are not saying that another form of notice would not be sufficient, we do believe that the form of notice provided by the legislature for the organization of the district would be the proper form also to be used for the dissolution of the district.

We notice with respect to the dissolution provisions of Section 198.360 that the "board of said district" is required to submit the issue to the voters, and therefore, Section 198.270 which charges the county court with election duties is not applicable, that is to say on dissolution the board of directors conducts the election, although, it would appear appropriate and advisable, if dissolution is voted, that such results as declared by the board be shown on the records of the county court in the same manner as was the order showing the proposition to organize under Section 198.270.

With respect to the form of the ballot, the general rule of course, is that the ballot must sufficiently inform the voters so that they can intelligently express themselves and mark their ballot accordingly whether they are for or against the issue. 29 C.J.S. Elections §173(2) et. seq. In our view the proposition can be stated quite simply by, in the ballot, asking the voters whether the described nursing home should be dissolved.

It is also our view that the box, "yes" and "no" proposition as set out in the ballot form of Section 198.260 should be used for the dissolution proposition.

Very truly yours,

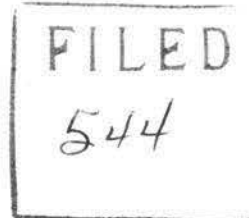
JOHN C. DANFORTH
Attorney General

December 31, 1970

OPINION LETTER NO. 544

(Answered by letter-Park)

Honorable John C. Ryan
State Senator
28th District
Walnut Hills, Rt 3
Sedalia, Missouri 65301



Dear Senator Ryan:

This letter is in response to your request for an opinion on the question of whether or not the individual concessionaires should collect local sales tax as well as state sales tax at the Missouri State Fair in Sedalia.

We assume from the inquiry that the concessionaires who are expected to make sales will be located on such part of the grounds of the Missouri State Fair as are within the geographical limits of the City of Sedalia and that the city has taken the necessary steps to comply with the provisions of the City Sales Tax Law, Sections 94.500 to 94.570, RSMo 1969, and thus may legally collect a city sales tax.

Section 94.510, RSMo 1969, provides that a city sales tax may be imposed on the receipts from the sale at retail of all tangible personal property or taxable services at retail within any city adopting such tax if such property and services are subject to taxation by the State of Missouri under the provisions of the Missouri Sales Tax Law (Sections 144.010 to 144.510, RSMo 1969).

No exemption is found in either the Missouri Sales Tax Law or the City Sales Tax Law for sales made by concessionaires on the Missouri state fair grounds. As a matter of fact, the state tax has been collected on sales by these

Honorable John C. Ryan

people in the past. It is our view that the city sales tax must be collected along with the state sales tax in the manner provided by law.

Yours very truly,

JOHN C. DANFORTH
Attorney General

SCHOOLS:

CONSTITUTIONAL LAW:

House Joint Resolution No. 1, Third
Extraordinary Session Seventy-fifth
General Assembly (Constitutional

Amendment No. 4 on ballot November 3, 1970), which enacts a new Section 11(c) of Article X of the Constitution of Missouri, provides that if the board of education of a school district does not submit to the electorate a proposal for a higher tax rate for school purposes after the effective date of the amendment, the last tax rate approved in the district shall continue for the current tax year.

OPINION NO. 546

November 20, 1970

Honorable Robert L. Prange
State Senator, District 14
State Capitol Building
Jefferson City, Missouri 65101



Dear Senator Prange:

This is in response to your request for an opinion from this office with regard to the following inquiry:

"If we assume that Constitutional Amendment No. 4 on the ballot for November 3 is passed and that this law would become effective 30 days after the election, would such law be applicable to any school election held before December 5 and, in your opinion, would it be necessary to run another school tax levy after December 5 in order to make that provision of Amendment No. 4 effective?"

House Joint Resolution No. 1, Third Extraordinary Session, Seventy-fifth General Assembly, was Constitutional Amendment No. 4 on the ballot of November 3, 1970. While the official canvass has not been made by the Secretary of State, the unofficial count indicates that this amendment received a majority vote, and, therefore, will go into effect thirty days after the election. Article XII, Section 2(b), Missouri Constitution, 1945.

Constitutional Amendment No. 4 repeals Section 11(c) of Article X, Missouri Constitution, and adopts in its place a new Section 11(c). When Amendment No. 4 becomes effective, Section 11(c) of Article X will read as follows:

"In all municipalities, counties and school districts the rates of taxation as herein limited may be increased for

Honorable Robert L. Prange

their respective purposes for not to exceed four years, when the rate and purpose of the increase are submitted to a vote and two-thirds of the qualified electors voting thereon shall vote therefor; provided in school districts the rate of taxation as herein limited may be increased for school purposes so that the total levy shall not exceed three times the limit herein specified and not to exceed one year, except as herein provided, when the rate period of levy and the purpose of the increase are submitted to a vote and a majority of the qualified electors voting thereon shall vote therefor; provided in school districts in cities of seventy-five thousand inhabitants or over the rate of taxation as herein limited may be increased for school purposes so that the total levy shall not exceed three times the limit herein specified and not to exceed two years, except as herein provided, when the rate period of levy and the purpose of the increase are submitted to a vote and a majority of the qualified electors voting thereon shall vote therefor; provided, that in any school district where the board of education is not proposing a higher tax rate for school purposes, the last tax rate approved shall continue and the tax rate need not be submitted to the voters; provided, that in school districts where the qualified voters have voted against a proposed higher tax rate for school purposes, then the rate shall remain at the rate approved in the last previous school election except that the board of education shall be free to resubmit any higher tax rate at any time; provided that any board of education may levy a lower tax rate than approved by the voters as authorized by any provision of this section; and provided, that the rates herein fixed, and the amounts by which they may be increased may be further limited by law; and provided further, that any county or other political subdivision, when authorized by law and within the limits fixed by law, may levy a rate of taxation on all property subject to its

Honorable Robert L. Prange

taxing powers in excess of the rates herein limited, for library, hospital, public health, recreation grounds and museum purposes."
(Emphasis supplied)

That portion of Constitutional Amendment No. 4 crucial to this opinion has been underscored.

We assume that your question pertains to the following factual situation: The school board of a six-director school district has prior to the effective date of Constitutional Amendment No. 4 submitted to the voters of the district proposals to increase the rate of taxation in the district and these proposals have been defeated by the voters. Your inquiry is what must the district do after the effective date of Constitutional Amendment No. 4 in order to take advantage of the provisions of that amendment and adopt last year's levy for the current year.

Initially, we must determine whether the underscored language of Constitutional Amendment No. 4 is self-enforcing or whether legislation is necessary to make this language effective. The rule by which it is determined if a constitutional provision is self-executing has been described as follows by the Missouri Supreme Court:

"One of the recognized rules is that a constitutional provision is not self-executing when it merely lays down general principles, but that it is self-executing if it supplies a sufficient rule by means of which the right which it grants may be enjoyed and protected, or the duty which it imposes may be enforced, without the aid of a legislative enactment. * * * Another way of stating this general, governing principle is that a constitutional provision is self-executing if there is nothing to be done by the legislature to put it in operation. In other words, it must be regarded as self-executing if the nature and extent of the right conferred and the liability imposed are fixed by the Constitution itself, so that they can be determined by an examination and construction of its terms, and there is no language indicating that the subject is referred to the legislature for action.' 11 Am.Jur., Constitutional Law, § 74, pp. 691, 692. See, also, 16 C.J.S., Constitutional Law,

Honorable Robert L. Prange

§ 48, pp. 98-101. . . ." State ex rel. City of Fulton v. Smith, 355 Mo. 27, 194 S.W.2d 302, 304 (banc 1946)

"The general rule is thus stated in 12 C. J. p. 729:

'It is within the power of those who adopt a constitution to make some of its provisions self-executing, with the object of putting it beyond the power of the legislature to render such provisions nugatory by refusing to pass laws to carry them into effect. * * *

'Constitutional provisions are self-executing when there is a manifest intention that they should go into immediate effect, and no ancillary legislation is necessary to the enjoyment of a right given, or the enforcement of a duty imposed.'

"And further, page 730:

'A constitutional provision designed to remove an existing mischief should never be construed as dependent for its efficiency and operation on the legislative will.'" State ex inf. Norman v. Ellis, 325 Mo. 154, 28 S.W.2d 363, 365 (banc 1930)

See also In re V -----, 306 S.W.2d 461, 463 (Mo. banc 1957).

With reference to the underscored wording of Constitutional Amendment No. 4, we do not believe that a statute is necessary to put this clause into effect. ". . . Any statute about the matter must needs follow the precise words or the very substance of the Constitution itself, and no statute which could be passed could clarify the matter in any respect whatever. . . ." State ex inf. Barker v. Duncan, 265 Mo. 26, 175 S.W. 940, 944 (banc 1915). The underscored portion of Amendment No. 4 is not so indefinite as to render it impossible of execution without specific legislative implementation. Furthermore, we believe that the intent of the framers of this language and the intent of those who adopted it was that it would provide immediate relief for the school districts of the state and that its effectiveness would not be dependent on

Honorable Robert L. Prange

legislative action. Therefore, we conclude that the underscored provision of Amendment No. 4 is self-enforcing and becomes effective thirty days after the election at which the amendment was approved.

Constitutional provisions are subject to the same general rules of construction as are statutes. The fundamental purpose in construing constitutional provisions is to ascertain and give effect to the intent of the framers of the provision and the people who adopted it. Rathjen v. Reorganized School District R-II, 365 Mo. 518, 284 S.W.2d 516, 524 (banc 1955). In construing the language of a constitution the words used, unless technical, are to be understood in their usual and ordinary sense. Vanlandingham v. Reorganized School District No. R-IV, 243 S.W.2d 107, 109 (Mo. 1951). Furthermore, a constitutional provision speaks as of its effective date unless the intention is manifest on its face beyond a reasonable doubt that the provision should operate retrospectively. City of Shreveport v. Cole, 129 U.S. 36, 32 L.Ed. 589, 9 S.Ct. 210 (1889); State ex rel Harrison v. Frazier, 98 Mo. 456, 11 S.W. 973 (1889); and State ex rel Scott v. Dircks, 211 Mo. 568, 111 S.W. 1 (1908).

Turning now to the underscored portion of Amendment No. 4, this proviso reads:

" . . . that in any school district where the board of education is not proposing a higher tax rate for school purposes, the last tax rate approved shall continue and the tax rate need not be submitted to the voters; . . . "

A school board "proposes" a higher tax rate by submitting such a "proposal" to the electorate. See Sections 164.021 and 164.031, RSMo 1969. Therefore, we conclude that if a school board, after the effective date of Amendment No. 4, does not propose to the voters of the district an increase in the tax rate for school purposes then the last tax rate approved shall continue and the tax rate need not be submitted for the approval of the electorate.

CONCLUSION

Therefore, it is the conclusion of this office that House Joint Resolution No. 1, Third Extraordinary Session Seventy-fifth General Assembly (Constitutional Amendment No. 4 on ballot November 3, 1970), which enacts a new Section 11(c) of Article X of the Constitution of Missouri, provides that if the board of education of a school district does not submit to the electorate a proposal for a higher tax rate for school purposes after the effective date of the amendment, the last tax rate approved in the district shall continue for the current tax year.

Honorable Robert L. Prange

The foregoing opinion, which I hereby approve, was prepared
by my Assistant, D. Brook Bartlett.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with the first name "John" and last name "Danforth" clearly distinguishable.

JOHN C. DANFORTH
Attorney General

OPINION LETTER 550

Answered by Klaffenbach

December 31, 1970

Honorable George E. Murray
Representative, 38th District
3 Williamsburg Road
Creve Coeur, Missouri 63141



Dear Representative Murray:

This letter is in response to your request for an opinion concerning the validity of a pension plan of a fire protection district organized under the provisions of Chapter 321 RSMo. 1969. You question various features of the plan and primarily the propriety of the purchase of annuity contracts for the individual fireman.

We have examined the plan in question and in view of the broad powers given such districts under Section 321.220 RSMo. 1969, we are of the view that the use of an annuity type plan of this nature is proper.

In this respect we call your attention to our Opinion No. 366 dated November 9, 1965 to Gralike, which is enclosed.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Answer by letter-Gardner

December 9, 1970

OPINION LETTER NO. 558

Honorable Raymond L. Skaggs
State Representative
District No. 150
State Capitol Building
Jefferson City, Missouri 65101



Dear Representative Skaggs:

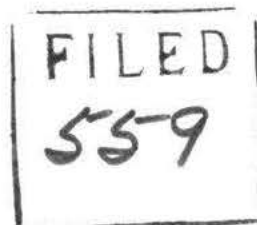
This letter is in response to your request for an opinion concerning the valuation of forest croplands under the State Forestry Law.

You have suggested that land may have been initially placed under the forest croplands program when such land had a value in excess of ten dollars per acre, as prohibited by Section 254.040, RSMo 1969. Under the law, the Conservation Commission is charged with the duty of ascertaining the per acre valuation. The law is admittedly meager in outlining formulae by which the Commission is to place a value on the "land alone" in such instances. Consequently, it must rest within the sound discretion of the Commission to employ just and equitable formulae.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Answered by Letter - Klaffenbach
OPINION LETTER NO. 559



Honorable Lawrence J. Lee
State Senator, Third District
State Capitol Building
Jefferson City, Missouri 65101

Dear Senator Lee:

This letter is in answer to your opinion request concerning the application of Section 483.530, RSMo 1969 and in particular what fees if any of the Circuit Clerk are to be taxed as costs when a court of criminal jurisdiction sets aside a bond forfeiture in a criminal case.

In our Opinion No. 33 dated February 11, 1970 to Lauderdale and in the addendum thereto we discussed numerous questions relating to the application of Section 483.530 and 483.540, RSMo 1969.

As you can see from that opinion, it is our view that the legislative intent clearly was that costs "for each criminal case" be set at a flat rate of \$7.50. We are enclosing a copy of that opinion and addendum.

We also note with respect to this question that the Supreme Court Rule 32.12 concerning bond forfeitures treats the action on the bond as one clearly within the jurisdiction of the court in which the defendant is required to appear under the condition of the bond and provides such liability may be enforced on motion without the necessity of an independent action. This all of course indicates that such a proceeding is part and parcel of the criminal proceeding.

Honorable Lawrence J. Lee

In view of these provisions of Section 483.530 we reach the same conclusion with respect to the court fees in criminal cases with respect to setting aside bonds forfeitures. That is we consider such an action by the court a part of the criminal case itself and therefore the clerk, in our view, is not entitled to any more than the flat \$7.50 for such criminal case and is therefore not entitled to any additional fee when the court sets aside a bond forfeiture in a criminal case.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Answer by letter-Blackmar

December 1, 1970

OPINION LETTER NO. 565



Honorable Thomas B. Burkemper
Prosecuting Attorney
Lincoln County Court House
Troy, Missouri 63379

Dear Mr. Burkemper:

This is an official opinion in response to your question as to whether a county political club, which raised some \$500 and spent that sum aiding political candidates of a particular political party, is required to file a report with the county recorder of deeds.

Your attention is directed to Section 129.200, RSMo 1969, which defines a political committee. That section reads as follows:

"Every two or more persons who shall be elected, appointed, chosen or associated for the purpose, wholly or in part, of raising, collecting or disbursing money, or of controlling or directing the raising, collection or disbursement of money for election purposes, and every two or more persons who shall cooperate in the raising, collection or disbursement, or in controlling or directing the raising, collection or disbursement, of money used or to be used in furtherance of the election or to defeat the election to public office of any person or any class or number of persons, or in furtherance of the enactment or to defeat the enactment of any law or ordinance, or constitutional provision, shall be deemed a 'political committee' within the meaning of sections 129.010 to 129.260."

Honorable Thomas B. Burkemper

Section 129.210 requires each political committee to appoint a treasurer. That section further provides:

" . . . All money collected or received or disbursed by any political committee, or by any member or members thereof, for any of the purposes mentioned in section 129.200, and for which such committee exists or acts, shall be paid over and made to pass through the hands of the treasurer of such committee, and shall be disbursed by him; and it shall be unlawful and a violation of sections 129.010 to 129.260 for any political committee, or for any member or members of a political committee, to disburse or expend money for any of the objects or purposes mentioned in section 129.200 and for which such committee exists or acts, until the money so disbursed or expended shall have passed through the hands of the treasurer of such political committee."

Section 129.230 requires the treasurer of a political committee to file a statement of receipts and expenditures with the county recorder of deeds. That section reads:

"Every treasurer of a political committee, as defined in sections 129.010 to 129.260 and every person who shall act as such treasurer, shall, within thirty days after each and every election, whether state, county, city, municipal, township or district election, in or concerning or in connection with which he shall have received or disbursed any money for any of the objects or purposes mentioned in section 129.200, prepare and file in the office of the recorder of deeds of the county in which such treasurer resides a full, true and detailed account and statement, subscribed and sworn to by him before an officer authorized to administer oaths, setting forth each and every sum of money received or disbursed by him for any of the objects or purposes mentioned in section 129.200, within the period beginning ninety days before such election and ending on the day on which such statement is filed, the date of each receipt and each disbursement, the name of the person from whom received or to whom paid, and the object or purpose for which the same was received, and the object or purpose for which disbursed. Such statement shall also set forth

Honorable Thomas B. Burkemper

the unpaid debts and obligations, if any, of such committee, with the nature and amount of each, and to whom owing, in detail, and if there are no unpaid debts or obligations of such committee, such statement shall state such fact."

Therefore, in answer to your question, it would appear that the county political club is a political committee under the provisions of Section 129.200, RSMo 1969, since it has raised and disbursed money used in furtherance of the election of a class of persons. As a political committee, money collected by members of the committee must pass through the hands of the committee treasurer under the provisions of Section 129.210, RSMo 1969, and the treasurer must file a statement of receipts and expenditures of such money with the county recorder of deeds under the provisions of Section 129.230, RSMo 1969.

Yours very truly,

JOHN C. DANFORTH
Attorney General

DENTISTS:
CONSTITUTIONAL LAW:

The provision of Section 332.131, RSMo 1969, which requires that candidates for licenses as dentists in the State of Missouri be citizens of the United States is unconstitutional.

OPINION NO. 566

November 25, 1970



Reuben R. Rhoades, D.D.S.
Secretary, Missouri Dental Board
415 Central Trust Building
Jefferson City, Missouri 65101

Dear Dr. Rhoades:

This opinion is in response to your question concerning the constitutionality of the citizenship requirement of Section 332.131, RSMo 1969. This section states:

"Any person who is at least twenty-one years of age, of good moral character and reputation, who is a graduate of and has a degree in dentistry from an accredited dental school, and who is a citizen of the United States of America may apply to the board for examination and registration as a dentist in Missouri."

As you know, we held in Opinion No. 276, dated May 22, 1970, to Graham, copy enclosed, that the United States citizenship requirement of the medical practice act is not constitutional. After a review of the statutes applicable to the practice of dentistry and of the reasons expressed in that opinion, we reach the conclusion that the provision of Section 332.131 which requires United States citizenship is likewise unconstitutional.

CONCLUSION

It is the opinion of this office that the provision of Section 332.131, RSMo 1969, which requires that candidates for licenses as dentists in the State of Missouri be citizens of the United States is unconstitutional.

Reuben R. Rhoades, D.D.S.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Klaffenbach.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

JOHN C. DANFORTH
Attorney General

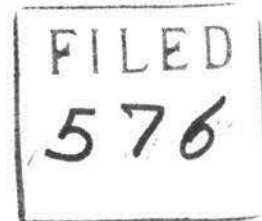
Enclosure: Op. No. 276
5-22-70, Graham

Answer by letter-Wieler

OPINION LETTER NO. 576

December 24, 1970

Mr. William P. Wright, Supervisor
Department of Liquor Control
Broadway State Office Building
Jefferson City, Missouri 65101



Dear Mr. Wright:

This is in response to your request for an opinion concerning the disposition of funds derived from the sale of contraband liquors pursuant to Section 311.840, RSMo 1969.

Section 311.840, sub. 4, provides that the residue or balance of such funds, after the payment of storage and costs of the proceedings in any action wherein seized property has been declared contraband and ordered sold, shall be paid into the general revenue fund of the State of Missouri, Section 311.810, RSMo 1969, in pertinent part, provides:

" . . . All intoxicating liquor unlawfully manufactured, stored, kept, sold, transported or otherwise disposed of, and the containers thereof and all equipment used or fit for use in the manufacture or production of the same, including all grain or other materials used, in the unlawful manufacture of intoxicating liquor, and which are found at or about any still or outfit for the unlawful making or manufacture of intoxicating liquor, are hereby declared contraband, and no right of property shall be or exist in any person or persons, firm, or corporation owning, furnishing or possessing any such property, liquor, material or equipment; but all such intoxicating liquors, property, articles

Mr. William P. Wright

and things, shall be sold upon an order of the court and in the manner provided in this chapter and the proceeds thereof shall be applied on the payment of any fine and costs lawfully assessed against any person or persons convicted of the unlawful manufacture, production, transportation, sale, gift, storing, or possession of intoxicating liquor, . . ."

In dealing with the predecessors of these statutes (Section 4917, Laws 1949, page 32 and R.S. 1939, Section 4916; Laws 1945, page 1043), this office issued an opinion stating that that portion of the statute which provided for the payment of monies derived from the sale of seized property declared contraband into the general revenue fund of the State of Missouri, following the payment of fine and the costs assessed therein, was contrary to Article IX, Section 7 of the Missouri Constitution, which provides that the clear proceeds of all penalties, forfeitures and fines collected for any breaches of the penal laws of the state are to be distributed to the schools of the several counties according to law. Therefore, we held that the residue of the amount received from the sale of such contraband after the payment of the fine assessed, if any, and the costs of the proceedings should be placed in the county school fund. See Opinion No. 10, issued to the Honorable Joseph M. Bone, Prosecuting Attorney, on June 24, 1949 (copy enclosed).

This opinion was based upon the premise that a sale of liquor under the circumstances outlined in the statutes amounted to a forfeiture for a breach of the penal laws of this state and, therefore, the clear proceeds of such sale were subject to the provisions of Article IX, Section 7 of the Missouri Constitution. In *New Franklin School Dist. No. 28, Howard County v. Bates*, 225 S.W.2d 769, 774 (Mo. 1950), the Missouri Supreme Court held that the words "penal laws of the state" as used in Section 7, Article IX of the Constitution refer to statutory enactments fixing or providing for penalties, forfeitures and fines and for their assessment and collection. Since the Missouri Liquor Control Act sets forth penalties for the unlawful manufacture, storage, sale or transportation of intoxicating liquor, one of which is the forfeiture and sale of the liquor itself, it is our view that the monies derived from such a forfeiture are proceeds collected for a breach of the penal laws of this state.

Therefore, it is our opinion that the residue of the amount received from the sale of contraband liquor after the payment of

Mr. William P. Wright

the fine assessed, if any, the cost of storage and the cost of the proceedings amounts to "clear proceeds" as contained in Article IX, Section 7 of the Missouri Constitution and should be placed in the county school fund.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 10
6-24-49, Bone

CONSTITUTIONAL LAW:
JUNIOR COLLEGE DISTRICTS:

The buildings and facilities of
junior college districts created
pursuant to Section 178.770 through

Section 178.890, RSMo 1969, are "state buildings and facilities" as that term is used in the perfected version of House Joint Resolution 1, Fourth Extraordinary Session, 75th General Assembly and, therefore, the junior college districts of Missouri would be eligible for funds from the Third State Building Fund to be created if the proposed constitutional amendment contained in House Joint Resolution 1 is approved by the voters.

OPINION NO. 578

December 16, 1970

Honorable E. J. Cantrell
State Representative
District No. 33
State Capitol Building
Jefferson City, Missouri 65101



Dear Representative Cantrell:

This is in response to your request for an opinion from this office with regard to the following inquiry:

"The House Appropriations Committee has had several requests for the inclusion of building projects on Junior College Campuses in the proposed \$250,000,000 bond issue. On behalf of my Committee, I would like an opinion from your office as to whether or not funds could be appropriated by the General Assembly for building aid to the Junior College Districts of Missouri."

We assume that the House Appropriations Committee is considering House Bill No. 2, Fourth Extraordinary Session, 75th General Assembly which contains a number of appropriations out of the state treasury chargeable to the Third State Building Fund. The Third State Building Fund will be created if House Joint Resolution 1, Fourth Extraordinary Session, 75th General Assembly is approved by the qualified voters of Missouri at the next general election in November, 1972, or at a special election called by the Governor. House Joint Resolution 1 is a proposed constitutional amendment to Article III of the Missouri Constitution adding Section 37(b) to Article III. Therefore, we assume your question to be whether House Joint Resolution 1, if approved by the voters of Missouri, would authorize appropriations to the junior college districts of Missouri out of the proceeds of the sale of the bonds authorized by that amendment.

Honorable E. J. Cantrell

The perfected version of House Joint Resolution 1, Fourth Extraordinary Session, 75th General Assembly, reads in part as follows:

"The general assembly has the power to authorize the contracting of an indebtedness on behalf of the State of Missouri and to issue bonds and other evidences of indebtedness not exceeding in the aggregate the sum of two hundred fifty million dollars for the purpose of repairing, remodeling and rebuilding state buildings and facilities and for the construction of additional buildings and facilities where necessary for furnishing and equipping any such improvements . . . The proceeds of the sale of the bonds issued hereunder shall be credited to a fund to be known as the 'Third State Building Fund', which is hereby created, and shall be expended for the purposes for which the bonds are herein issued and for no other. . . ."

The proceeds from the sale of these bonds must be expended only for the purposes for which the bonds are issued. That purpose, as clearly stated in the first sentence of House Joint Resolution 1, is for:

" . . . repairing, remodeling and rebuilding state buildings and facilities and for the construction of additional buildings and facilities where necessary for furnishing and equipping any such improvements . . ."
[emphasis supplied]

Therefore, are the buildings and facilities belonging to the junior college districts of Missouri "state" buildings and facilities?

Constitutional provisions, in general, are subject to the same rules of construction as other laws, due regard being given to its broader scope as a charter of popular government. The fundamental purpose in construing constitutional provisions is to ascertain and give effect to the intent of the framers of the provision and of the people who adopt the provision. State ex rel. Jones v. Atterbury, 300 S.W.2d 806, 810 (Mo. banc 1957); Rathjen v. Reorganized School District R-II of Shelby County, 365 Mo. 518, 284 S.W.2d 516, 524 (banc 1955). In construing the language of a constitution, the words used, unless technical, are to be understood in their usual and ordinary sense. Vanlandingham v. Reorganized School District No. R-IV of Livingston County, 243 S.W.2d 107, 109 (Mo. 1951).

Honorable E. J. Cantrell

We believe that the word "state" as used in House Joint Resolution 1 is intended to restrict the use of the proceeds of the sale of the bonds to buildings and facilities owned by the state. Are buildings and facilities of junior college districts owned by the state?

The general rule applicable to elementary and high school districts is that the ownership of school property is in the local school board as trustee for the public. School property is public or state property and not the private property of the school district in which the property is located. 47 Am.Jur., Schools, Section 65 and 78 C.J.S., Schools and School Districts, Section 242.

In School Dist. of Oakland v. School Dist. of Joplin, 340 Mo. 779, 102 S.W.2d 909 (1937), the Missouri Supreme Court had before it an argument between two school districts as to the ownership of a school site and building. In reaching its decision the court determined that property of school districts in Missouri acquired with public funds is the property of the state.

"I. Section 1 of article 11 of the Constitution of Missouri (15 Mo.St.Ann. p. 810) provides: 'A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the General Assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this State between the ages of six and twenty years.' The General Assembly, by statutory enactment, has provided for the establishment of units, designated 'school districts,' their organization, and vested said districts with certain powers and duties (chapter 57, R.S. 1929, § 9194 et seq., Mo.St.Ann. § 9194 et seq., p. 7066 et seq.) to facilitate its effectual discharge of this constitutional mandate. The school districts are organized as separate legal entities. School Dist. No. 7 v. School Dist. of St. Joseph, 184 Mo. 140, 156, 82 S.W. 1082, 1086. They are public corporations, form an integral part of the state, and constitute that arm or instrumentality thereof discharging the constitutionally intrusted governmental function of imparting knowledge and intelligence to the youth of the state that the rights and liberties of the people be preserved. State ex inf. McKittrick v. Whittle, 333 Mo. 705, 709 (3), 63 S.W.(2d)

100, 102 (4); City of Edina to Use v. School District, 305 Mo. 452, 461, 267 S.W. 112, 115 (1), 36 A.L.R. 1532; State ex rel. v. Gordon, 231 Mo. 547, 574, 133 S.W. 44, 51; State ex rel. Richart v. Stouffer (Mo.Sup.) 197 S.W. 248, 252 (4); State ex rel. v. Board of St. Louis Public Schools, 112 Mo. 213, 218, 20 S.W. 484, 485. They are supported by revenues derived from taxes collected within their respective territorial jurisdictions and the general revenues of the state collected from all parts of the state. These taxes and such property as they may be converted into occupy the legal status of public property and are not the private property of the school district by which they may be held or in which they may be located. State ex inf. Carnahan v. Jones, 266 Mo. 191, 198, 181 S.W. 50, 51 (2); State ex rel. Gordon, 261 Mo. 631, 641 (3), 170 S.W. 892, 894 (3-5); State ex rel. Bilby v. Brooks (Mo.Sup.) 249 S.W. 73, 75 (4); City of Edina to Use v. School District, supra; State ex rel. Richart v. Stouffer, supra. Consult 56 C.J. p. 435, § 408; p. 453, § 448; p. 469, § 476, note 22; 24 R.C.L. p. 581, § 30." Id. at 910

* * *

" . . . In Missouri the property of school districts acquired from public funds is the property of the state, not the private property of the school district in which it may be located, and the school district is a statutory trustee for the discharge of a governmental function entrusted to the state by our Constitution.

* * *

" . . . But, we have ruled the property involved is public property of the state, not the property of plaintiff or defendant. . . ." Id. at 915

Junior college districts created pursuant to Sections 178.770 through 178.890, RSMo 1969, possess generally the same corporate powers as common and six-director districts. See subparagraph 2 of Section 178.770. Therefore, we believe that the property of junior college districts purchased with public funds is also the property of the state.

Honorable E. J. Cantrell

CONCLUSION

It is the opinion of this office that the buildings and facilities of junior college districts created pursuant to Section 178.770 through 178.890, RSMo 1969, are "state buildings and facilities" as that term is used in the perfected version of House Joint Resolution 1, Fourth Extraordinary Session, 75th General Assembly and, therefore, the junior college districts of Missouri would be eligible for funds from the Third State Building Fund to be created if the proposed constitutional amendment contained in House Joint Resolution 1 is approved by the voters.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, D. Brook Bartlett.

Yours very truly,

A handwritten signature in dark ink, appearing to read "John C. Danforth", written in a cursive style.

JOHN C. DANFORTH
Attorney General

Answer by Letter (Klaffenbach)

December 30, 1970

OPINION LETTER 583

Mr. Howard L. McFadden
General Counsel
Department of Corrections
Post Office Box 267
Jefferson City, Missouri 65101



Dear Mr. McFadden:

This letter is in response to your opinion request concerning whether Section 11.090, RSMo 1969 prohibits the release of information concerning prisoners' names, confinements or discharges from the penitentiary to the general public or for use by the State Highway Patrol in its informational publications.

Section 11.090 provides:

"It is unlawful to print in the report of any penal or eleemosynary institution in this state, the names of the persons received and confined therein, or discharged therefrom."

It is our view that this section does not prevent the release of such information to the general public or to the State Highway Patrol for use in highway patrol informational publications.

Very truly yours,

JOHN C. DANFORTH
Attorney General

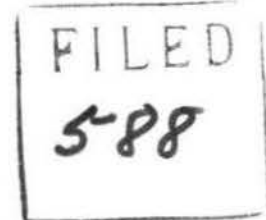
SECRETARY OF STATE:
ELECTIONS:
POLITICAL PARTIES:
CANDIDATES:

The American Party is no longer an established political party for the purpose of nominating candidates for Governor or other statewide offices in the State of Missouri because the only candidate for state office received less than two percent of the vote at the 1970 General Election. Since the American Party is not now an established party for the entire state the Secretary of State should not accept declarations of candidacy for Governor or other statewide offices for such non existent party.

OPINION NO. 588

December 18, 1970

Honorable James C. Kirkpatrick
Secretary of State
State of Missouri
Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Kirkpatrick:

This is in reply to your request for an official opinion from this office as follows:

"In your opinion No. 153, dated April 1, 1970, addressed to Honorable G. William Weier, you ruled that the American Party was an established political party in the State of Missouri and all political subdivisions of the State for the purpose of nominating candidates at the August, 1970 primary.

"This office has just completed the official canvass of the 1970 General Election pursuant to Section 111.681, RSMo, wherein it has been determined that of the 1,283,312 votes cast for United States Senator, Gene Chapman, the only American Party candidate for statewide office, received a total of 10,065 votes.

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"We have reason to believe a declaration of candidacy for the office of governor on the American Party ticket will be presented for filing in this office on December 18, 1970.

"We would appreciate an opinion from you at your earliest convenience as to whether such declaration may be accepted for filing under Section 120.340."

Section 120.340, RSMo 1969, provides as follows:

"No candidate's name shall be printed upon any official ballot at any primary election unless the candidate has on or before five p.m. prevailing local time on the last Tuesday of April preceding the primary filed a written declaration of candidacy, as provided in sections 120.300 to 120.650, stating his full name, residence, office for which he proposes as a candidate, the party upon whose ticket he is to be a candidate, and that if nominated and elected to the office he will qualify. . . ."

In Attorney General's Opinion No. 153 issued April 1, 1970, we held that since the American Party received more than two percent of the vote cast in the November 5, 1968, General Election for its statewide candidate, it became an established political party within the state as defined by Section 120.160, RSMo 1969.

Section 120.160(5), RSMo 1969, states in part as follows:

". . . If, at the election immediately following the election at which the names of the candidates of the party first appear on the ballot, any candidate or candidates of the new political party shall receive more than two percent of all votes cast at such election in the state, or two percent of the total vote cast in any district or political subdivision of the state, as the case may be, then the new political party shall become an established political party within the state or within the dis-

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trict or political subdivision, as the case may be, under the provisions of the laws regulating the nominations of established political parties at state primary elections as provided by law, except that if in any ensuing election the party fails to have a candidate or fails to receive two percent of the total votes cast at such election in the state, district or political subdivision, as the case may be, the party shall no longer be deemed an established party."

Since the American Party candidate for statewide office failed to receive "two percent of the total votes cast at such election in the state," the American Party is no longer an established party within the entire state and no declaration of candidacy for Governor or other statewide office for such non existent party should be accepted by the Secretary of State.

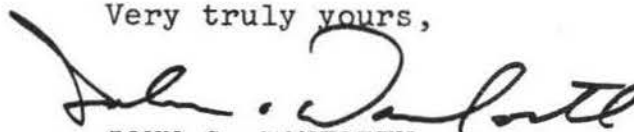
CONCLUSION

It is therefore the opinion of this office that the American Party is no longer an established political party for the purpose of nominating candidates for Governor or other statewide offices in the State of Missouri because the only candidate for state office received less than two percent of the vote at the 1970 General Election.

Since the American Party is not now an established party for the entire state the Secretary of State should not accept declarations of candidacy for Governor or other statewide offices for such non existent party.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Harvey M. Tettlebaum.

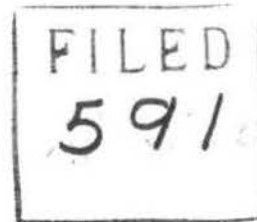
Very truly yours,



JOHN C. DANFORTH
Attorney General

Answered by Letter - Klaffenbach
OPINION LETTER NO. 591

December 24, 1970



Honorable William S. Brandom
Prosecuting Attorney
Clay County Court House
Liberty, Missouri 64068

Dear Mr. Brandom:

This letter is in answer to your opinion request concerning whether a coroner of a second class county who is a physician must perform a post-mortem examination and, if so, whether he is entitled to the additional fee provided by Section 58.530, RSMo 1969. You also inquire concerning under what circumstances a coroner who is a physician may call upon a physician, surgeon or pathologist to conduct a post-mortem examination.

As you noted, Section 58.090, RSMo 1969 provides that the coroner of a second class county receive a salary in lieu of all other fees and emoluments. See also our Opinion No. 101 dated July 11, 1967 to Bruce, attached. Such a coroner who is himself a physician is therefore not entitled to receive the fee provided under Section 58.530, RSMo 1969.

Section 58.560, RSMo 1969 to which you also refer provides:

"When a physician, surgeon or pathologist shall be called on by the coroner, or any magistrate of the county acting as the coroner, to conduct a postmortem examination,

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the county court of said county shall be authorized to allow such physician, surgeon, or pathologist to be paid out of the county treasury, such fees or compensation as shall be deemed by said court to be just and reasonable."

In our view, a coroner-physician is not required to conduct the post-mortem examination himself and may call on a pathologist or other physician or surgeon to conduct the post-mortem examination and the county court is authorized to allow reasonable compensation to such person for such services.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosure:

Op. No. 101
7-11-67, Bruce